Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-872

COMMITTEE OF INTERNS AND RESIDENTS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

NEW YORK STATE LABOR RELATIONS BOARD,

Respondents.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Committee of Interns and Residents, prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Second Circuit entered in the office of the clerk on November 1, 1977.

Opinions Below

The opinion of the District Court is reported at 426 F. Supp. 438 (S.D.N.Y. 1977), and is reproduced as Appendix I, *infra*, at App. 1a-App. 30a. The opinion of the United

States Court of Appeals for the Second Circuit is not officially reported, appears at 96 LRRM 2342 (2d Cir. 1977), and is reproduced in Appendix II, *infra,* at App. 34a-App. 49a.

Jurisdiction

The Second Circuit rendered and entered its judgment reversing the summary judgment of the District Court on September 21, 1977, and its judgment granting a permanent injunction on November 1, 1977. The permanent injunction is reproduced in Appendix II, *infra,* at App. 50a-App. 51a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the National Labor Relations Board is empowered to establish as a "national labor policy" that interns, residents and fellows ("house staff") at non-profit voluntary hospitals shall not be entitled to the right provided to employees by the National Labor Relations Act to organize and bargain collectively and that the State of New York shall be preempted and ousted from covering such house staff under the New York Sate Labor Relations Act, where Congress did not provide or intend that there be such a no-man's land in house staff labor relations and labor disputes?

2. If the answer to the prior question is in the affirmative, whether the creation of such a no-man's land in the area of the vital state and local concern to provide an effective and peaceful labor relations mechanism to deal with house staff labor relations and disputes and their effect on hospital patient care, violates the Tenth Amendment to the United States Constitution?

Constitutional and Statutory Provisions Involved

1. Tenth Amendment to the United States Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. National Labor Relations Act, § 14, 49 Stat. 449, ch. 372 (1935), as amended by 61 Stat. 136, title I § 151 (1947), Pub.L.No. 86-257, 73 Stat. 541, title VII § 701(a) (1959); 29 U.S.C. § 164 (1970):

See Appendix III, *infra,* at App. 56a-App. 57a.

3. The 1974 Health Care Amendments, Pub.L.No. 93-360, 88 Stat. 395, 93d Cong., 2d Sess. (1974):

See Appendix III, *infra,* at App. 52a-App. 56a.

Statement of the Case

1. Preliminary statement.

This is an action by the respondent, National Labor Relations Board ("NLRB"), for injunctive and declaratory relief against the defendant-respondent New York State Labor Relations Board ("SLRB") and defendant-petitioner Committee of Interns and Residents ("CIR"), an organization comprised of and representing interns, residents and clinical fellows (collectively known as "house staff officers").

At the time of the institution of this action the SLRB was under the order of the New York State Supreme Court, New York County, in a proceeding brought by the CIR, to assume and assert jurisdiction over unfair labor practice

charges and certification proceedings initiated before the SLRB by the CIR pursuant to the State Labor Relations Act, New York Labor Law §§ 700-17 (McKinney's 1977) ("SLRA"). The complaint alleges that the National Labor Relations Act ("NLRA") has preempted the area of labor relations of voluntary hospitals, including their house staff officers, and the exclusion of house staff officers by the NLRB from the NLRA ousts the SLRB from exercising any jurisdiction over such house staff. A. 3-10.[1] Jurisdiction for injunctive relief was based by the NLRB upon the *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971), exception to the 28 U.S.C. 2283 proscription against federal injunctions of state court proceedings.

The CIR answer denies that the NLRB is lawfully authorized or was intended by the NLRA to preempt all state and local coverage of house staff labor matters by reason of the exclusion of house staff from NLRA coverage by the NLRB. A. 19-38. As a first defense, the answer asserts that injunctive relief is barred by 28 U.S.C. 2283, considerations of comity, and the absence of any showing of injury or damage. As a second defense, the answer sets out that the preemption and ouster of state jurisdiction over house staff proposed by the NLRB is not authorized by the NLRA and contrary to the purpose, intent, and legislative history of the NLRA. And as a third defense, the answer asserts that if, as the NLRB contends, the NLRA effects or authorizes the exclusion of house staff officers from state and local as well as federal labor relations law coverage, the NLRA is so arbitrary, unreasonable, and without cause or justification as to violate the Due Process Clause of the Fifth Amendment and the reserved powers of the Tenth Amendment to the United States Constitution.

[1] The Appendix in the Court of Appeals, transmitted to this Court as the record in this case, is referred to herein as "A".

The SLRB answer, in effect, submits to the jurisdiction of the court and such judgment as the court may issue. A. 160.

Prior to the joinder of issue, the NLRB moved for a preliminary injunction prohibiting the SLRB from processing the matters remanded to the SLRB by the state court. A. 13-16. Simultaneously with the service of its answer, the CIR cross-moved for summary judgment (A. 17-18), with supporting affidavits (A. 150-59). The NLRB submitted no response to the affidavits of the CIR on the summary judgment cross-motion. The record consists of the described pleadings and raises no issue of fact.

2. The facts.

The CIR is an organization representing approximately 6,000 house staff officers in the New York City metropolitan area working as physicians in training programs at municipal and voluntary non-profit hospitals. A. 20.[2] The organization has been functioning in the foregoing capacity since

[2] House staff officers are college and medical school graduates, licensed physicians or otherwise legally authorized to provide medical care at hospitals, who provide such care to hospital patients as part of an American Medical Association ("AMA") accredited hospital-based training program in a medical specialty or sub-specialty. See AMA Liaison Committee on Graduate Medical Education, *Directory of Accredited Residencies 1975-76* (1976) ("*Residency Directory*") at 333. The satisfactory completion of such a training program qualifies a house staff officer to take an AMA specialty board examination which, if passed, results in certification in the specialty by that board. *Id.* at 367. Certification is not a legal prerequisite to the practice of a specialty. The described training program consists of patient care as well as academic activities. *Id.* at 333-38. A study by the Institute of Medicine, sponsored by the United States Department of Health, Education and Welfare pursuant to law, found that 84% of the time of a house staff officer is devoted to patient care; 10% to "learning"; 3% to "research"; and approximately 60% in patient care and teaching without direct supervision. Institute of Medicine, *Medicare-Medicaid Reimbursement Policies*, Final Report, ch. 4 ("Graduate Medical Education") (March 1976) at 12, Table 6.

1957. *Ibid.* Prior to October 1, 1976, the CIR had collective bargaining contracts covering approximately 4,000 house staff officers at twelve voluntary non-profit hospitals, seven independent non-profit voluntary institutions, and nine New York City municipal hospitals. *Ibid.* In each hospital covered by an agreement with the CIR, the organization was recognized by the agreement and/or certified by the SLRB or NLRB as the exclusive collective bargaining representative of the house staff. A. 21-22. The described collective bargaining agreements covered matters such as wages, vacations, insurance, uniforms, laundry, meals, housing, on-call rooms, work schedules, tenure, grievance procedures, etc. CIR Answer, Exh. 1 and 2.

The SLRB is the state agency with jurisdiction, pursuant to the SLRA (Labor Law, Article 20), to implement and enforce the lawful rights of employees to bargain collectively through labor organizations of their own choosing. SLRA § 1(12) [Labor Law § 701(12)] extends coverage of the SLRA to persons working or employed at non-profit voluntary health institutions. Prior to 1974 the SLRB held that house staff officers at voluntary hospitals are covered by the SLRA. *Brooklyn Eye and Ear Hospital*, 32 SLRB No. 21 (1966); *Long Island College Hospital*, 33 SLRB No. 32 (1967).

In that same period prior to 1974, the NLRA excluded from its coverage employees of charitable, non-profit institutions. Effective August 25, 1974, that exclusion was dropped upon the enactment of Public Law 93-360, 88 Stat. 395, 93rd Cong., 2d Sess. ("PL 93-360").[3] In the first

[3] PL 93-360 also added certain notice, mediation, and fact finding procedures in connection with disputes and strikes in non-profit health care institutions. NLRA §§ 8(d), 8(g), 213 [29 U.S.C. 158(d), 158(g), 183].

NLRB case involving house staff, however, it was held that house staff, "although they possess certain employee characteristics, are primarily students," not employees covered by the NLRA, and that their house staff organizations are not labor organizations within the NLRA. *Cedars-Sinai Medical Center*, 223 NLRB No. 57 (1976), *reconsid. den.*, 224 NLRB No. 90 (1976) ("*Cedars-Sinai*").[4] The same conclusion was reached by the NLRB in every subsequent house staff case.[5] Each of the cited cases after *Cedars-Sinai* was decided by the NLRB without review or discussion of the house staff involved, but with the conclusory finding only that the house staff "are not unlike those" in *Cedars-Sinai*.

After the NLRB decision in *Cedars-Sinai*, the CIR instituted four separate proceedings before the SLRB involving voluntary health care institutions in New York: (1) a certification proceeding where the CIR represented a majority of the house staff at a hospital, but there was no previous certification or contract and the hospital refused to bargain with the CIR; (2) an unfair labor practice charge where

[4] Then NLRB Member, now Chairman, Fanning dissented. In December 1975 the AMA, the national governing authority for house staff programs, resolved at its House of Delegates that the "fact that they [house staff] are in a learning process of acquiring new skills does not detract from their legal right to organize and engage in collective bargaining under the National Labor Relations Act". Hearings on H.R. 2222, 95th Cong., 1st Sess., 76 (1977). See also AMA, *Residency Directory*, at 338 dealing with "[e]mployment relations of house officers," and AMA, "Guidelines for House staff Contracts or Agreements," 1 *Employee Relations L.J.* 418, 430-35 (1976).

[5] *St. Christopher's Hospital for Children*, 223 NLRB No. 58 (1976); *University of Chicago Hospitals & Health Clinics*, 223 NLRB No. 154 (1976); *St. Clare's Hospital & Health Center*, 223 NLRB No. 163 (1976) (CIR was the petitioner in this case); *Buffalo General Hospital*, 224 NLRB No. 17 (1976); *Kansas City General Hospital & Medical Center*, 225 NLRB No. 14 (1976) ("*Kansas City I*"); *Wayne State University*, 226 NLRB No. 168 (1976); see also *Mental Health & Family Services Center*, 225 NLRB No. 105 (1976). Member Fanning dissented in each case.

the CIR was newly certified by the New York Regional Director of the NLRB after an election as the collective bargaining representative of the house staff at a hospital, but the hospital refused to bargain with the CIR; (3) an unfair labor practice charge where the CIR was recognized by an expired contract as the representative of clinical fellows at a hospital, but the hospital refused to bargain with the CIR upon the termination of the contract and proceeded unilaterally to make salary and other changes affecting clinical fellows; and (4) unfair labor practice charges where the CIR was certified and recognized under an existing contract as the house staff representative at four hospitals, but those hospitals refused to negotiate new contracts with the CIR and made unilateral changes affecting house staff hours, wages, or terms of employment. A. 5-8, 24-25; see also CIR answer Exh. 11-14. All of the hospitals predicated their refusal to bargain with the CIR upon the NLRB ruling in *Cedars-Sinai* and objected to any intervention by the SLRB, claiming that the SLRB is without jurisdiction by reason of the NLRA coverage of non-profit hospitals pursuant to PL 93-360. A. 151-52. According to the hospitals, the NLRB denial of NLRA coverage to house staff also ousted the SLRB of jurisdiction over house staff. A. 152. The cumulative effect of such denial and ouster of jurisdiction was alleged by the CIR, without contradiction, to be totally destructive of long-established CIR collective bargaining rights, except insofar as such rights could be extracted from the hospitals by the CIR by self-help. A. 153.

On July 14, 1976, the SLRB in *Misericordia Hospital Medical Center*, 39 SLRB No. 32, briefly recited the background giving rise to the issue of preemption, and then concluded:

> "The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments

> can be, and have been made on both sides of this issue. On balance, we have concluded that further processing of this matter before this Board is not warranted at this time. Accordingly, we shall dismiss the petition." (*Id.* at 2).

The same ruling was rendered in each of the other CIR proceedings before the SLRB. A. 26-27.

Four proceedings were instituted by the CIR against the SLRB in the New York Supreme Court, New York County, each one covering one of the four different fact situations described at pp. 7-8, *supra*, and all seeking to reverse the SLRB determinations and to compel the SLRB to assume and exercise jurisdiction.[6] By decision dated October 14, 1976, Mr. Justice Gellinoff of the New York Supreme Court granted the CIR petitions and held that the SLRB was not preempted by the NLRA from exercising jurisdiction over house staff represented by the CIR at the voluntary hospitals involved. *CIR* v. *SLRB*, 88 Misc. 2d 502, 388 N.Y.S.2d 509.[7]

On September 3, 1976, during the pendency of the proceedings in the state court, the CIR invited the NLRB in

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[6] On September 3, 1976, several of the voluntary hospitals involved, whose intervention was consented to by the CIR as early as September 3, obtained adjournments in the state court to September 16, 1976. A. 152-53. On September 15 and September 16, 1976, those hospitals removed the state court proceedings to this Court upon *ex parte* petitions to U.S.D.C. Judge Brieant. A. 9, 28. Further delays were obtained by those hospitals with respect to the CIR motion for remand, which motion was ultimately granted by Judge Brieant in a memorandum and order of September 28, 1976. *CIR* v. *SLRB*, 420 F.Supp. 826 (S.D.N.Y. 1976). On the remand, the hospitals requested and were granted still a further delay in the state court proceedings. A. 153.

[7] Reliance was placed by the state court on *Kansas City I* where the NLRB stated it had no jurisdiction over the hospital, the alleged employer of the house staff, so that the state court saw no NLRB jurisdictional obstacle to SLRB jurisdiction.

writing to participate in those proceedings. A. 30-31. The NLRB declined that opportunity on September 8, 1976. A. 31. Instead, shortly after the state court determination that the SLRB was not preempted, the NLRB on November 9, 1976, *sua sponte*, "revised" its decision in *Kansas City I* in the form of *Kansas City General Hospital & Medical Center*, 225 NLRB No. 14A (*"Kansas City II"*). This opinion was expressly directed at the state court decision and declared, Member Fanning dissenting, that *Cedars-Sinai* and the other NLRB house staff decisions were intended to preempt and oust state and local governments from jurisdiction over voluntary hospital house staff labor matters as a matter of "national labor policy" (which was not otherwise spelled out in *Kansas City II*). *Kansas City II* involved none of the parties here concerned and the issue of preemption had not been raised or argued in that case. A. 32; see also *Kansas City II* at 4 n.6. The instant action was commenced by the NLRB approximately one week after *Kansas City II*. On December 17, 1976, the NLRB motion for an injunction and the CIR cross-motion for summary judgment were argued before United States District Court Judge Charles E. Stewart, Jr. A. 73.

Shortly after *Kansas City II*, the hospitals moved in the state court for reargument. On January 6, 1977, that motion was granted as the state court deemed itself bound by *Kansas City II*. *CIR* v. *SLRB*, 89 Misc. 2d 424, 391 N.Y.S.2d 503. Thereupon the NLRB sought to withdraw the matter pending before the District Court, but that application was denied by Judge Stewart.

On February 2, 1977, the District Court denied the NLRB motion for a preliminary injunction and granted the CIR cross-motion for summary judgment.[8] District

[8] The District Court sustained the NLRB contention as to jurisdiction pursuant to *Nash-Finch*, *supra*. No appeal was taken from this aspect of the District Court ruling.

Judge Stewart held that since the NLRB found that house staff officers were not employees within the NLRA, the NLRB was essentially without jurisdiction over such house staff and therefore preemption could not be effected. He also concluded that the purpose of PL 93-360 was better served, in view of the absence of NLRB jurisdiction, by the assertion of SLRB jurisdiction in that regulation and control could thereby be exercised over house staff labor relations and disputes potentially threatening to hospital patient care.

On May 27, 1977, following the decision of the District Court and the filing of the NLRB appeal to the Court of Appeals, the NLRB rendered its decision in *St. Clare's Hospital*, 229 NLRB No. 158 (*"St. Clare's"*), denying a motion for reconsideration pending since April 27, 1976. *St. Clare's* at 1.[9] *St. Clare's* articulated a national labor policy concerning house staff labor relations not previously stated by the NLRB and not discernible to the District Court. *St. Clare's* at 1-16. In addition to Chairman Fanning's dissent (*id.* at 18-31), Member Jenkin's concurred only in the result because he "disagree[d] wholly" with the

[9] Although that motion contained only "an allusion to the possible preemptive effect of *Cedars-Sinai*" (*St. Clare's* at 31), and the issue of preemption was not there further raised or argued, the NLRB reviewed the state and federal litigation leading to the appeal below (*id.* at 2-3), and because of the "uncertainty" and "misunderstanding,"—for which the NLRB could "perhaps justifiably" be blamed, —as to the "national labor policy," the NLRB proceeded to "clarify" and amplify its view on proscription, by means of preemption, of house staff collective bargaining. In dissent, Chairman Fanning pointed out that *St. Clare's* as *Kansas City II*, was more oriented to litigation constraints than to the statutory adjudicatory functions of the NLRB. *Id.* at 18 n. 33; 34; 19; 23; 25 n. 48; 30.

per se rule that "any employees who also engage in structured studies" are excluded from coverage. *Id.* at 17. Former Chairman and now Member Murphy, who had previously said that she had not understood in *Cedars-Sinai* "that the Board was preempting the field" (*Kansas City II* at 4 n. 6), was "sympathetic to Member Jenkins' concurrence," but, "under the circumstances of this case," which she never explicated, "she joins the majority herein." *St. Clare's* at 3 n. 11.

On September 21, 1977, the Court of Appeals for the Second Circuit reversed the District Court, and on November 1, 1977, the Second Circuit issued its permanent injunction against the SLRB and CIR.[10] In writing for a unanimous court, Presiding Circuit Judge Thomas J. Meskill, concluded that Congress intended by PL 93-360 to preempt the area of labor relations in voluntary hospitals, and since Congress could, pursuant to such exercise of its preemptive power, have determined to exclude house staff from all coverage, state as well as national, the NLRB was likewise authorized to do so. In addition, the Second Circuit considered that SLRB coverage would subject the hospitals, otherwise covered by the NLRA, to the differing standards and procedures of the NLRA and SLRA.

[10] Originally the Court of Appeals remanded because it considered that the matter could be moot because the SLRB might abide by the opinion of the Second Circuit without any judicial mandate. App. 49a. But the SLRB advised the Court of Appeals that the SLRB would not relinquish jurisdiction. On November 1, 1977, therefore, the Second Circuit issued a permanent injunction against the SLRB and the CIR asserting or attempting to cause the SLRB to assert jurisdiction over house staff. App. 50a.

REASONS FOR GRANTING THE WRIT

I.

The decision below, to the extent that it sustained the power of the NLRB to preclude all labor relations law coverage, state as well as federal, of house staff labor relations or disputes, notwithstanding the absence of any congressional mandate or intention to create such a no-man's land as to house staff, has decided an important state question in a way in conflict with applicable state law; has decided a federal question in a way in conflict with applicable decisions of this Court; and, at the least, has decided an important question of federal law which has not been, but should be settled by this Court.

(1)

The SLRA covers employees of a non-profitmaking hospital, who are defined as "any person[s] employed or permitted to work by or at a non-profitmaking hospital." SLRA § 1(12), Labor Law § 701(12). This coverage, which is broader than that provided by NLRA § 2(3) [29 U.S.C. 152(3)], was enacted in 1963 and stemmed from long prior experience "with repeated strikes, picket lines and violence in non-profitmaking hospitals, which interrupted essential services by hospital employees" [*Long Island College Hospital* v. *Catherwood*, 23 N.Y.2d 20, 31 (1968) (Fuld, C.J.), *app. dis.*, 394 U.S. 716 (1969)], and in recognition of the "profound public interest directly related to health and lives in the community" [*Mount St. Mary's Hospital* v. *Catherwood*, 26 N.Y.2d 493, 510 (1970) (Breitel, J.)].

The unique and special SLRA address to labor disputes in voluntary hospitals manifests the "profound public interest" in such matters in the State of New York. Unlike other labor disputes in the private sector, those in the hospital area are expressly prohibited from ending in

strikes or lock-outs. SLRA § 13, Labor Law § 713. And whereas other private labor disputes are left to the free play of economic forces for their resolution, grievances and bargaining impasses in hospitals are made the subject of settlement processes such as grievance procedures and arbitration. SLRA § 16, Labor Law § 716. These provisions are in addition to all those others in the SLRA available to hospital as well as all other employees. New York has, therefore, made more careful and complete provision for labor disputes in its hospitals than in any other field of labor relations in the private sector.

(2)

Preemption is generally not to be based upon conflicts which "may possibly" arise, as distinct from those which "will necessarily arise." *Goldstein* v. *California*, 412 U.S. 546, 554 (1973), *reh. den.*, 414 U.S. 883 (1973); see also *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, v. *Ware*, 414 U.S. 117 (1973); *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 172, 174 (1962); cf. *Askew* v. *American Waterways Operations Inc.*, 411 U.S. 325 (1973); see, generally, Bratton, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," 75 *Colum. L. Rev.* 623, 646-49 (1975). The cited cases fully vindicate the early view of Hamilton that preemption requires a showing not of "a mere possibility of inconvenience in the exercise of power, but an immediate constitutional repugnancy." The Federalist No. 32 (Wright ed. 1961) at 243.

What is here ultimately involved is the power of the State of New York to protect the health and welfare of its people in an area where the NLRA, according to the NLRB, has chosen to be silent. It is "now [a] familiar

maxim" that in cases "involving state statutes designed to protect public health and safety, . . . a federal statute will not be deemed to preempt state action unless there is a direct conflict or a clearly manifested congressional intent to that effect." Murphy and LaPierre, "Nuclear 'Moratorium' Legislation in the States and the Supremacy Clause: A Case of Express Preemption," 76 *Colum. L. Rev.* 392, 439 (1976); see also *Florida Lime and Avocado Growers Inc.* v. *Paul*, 373 U.S. 132, 142 (1963); *California* v. *Zook*, 336 U.S. 725, 733 (1949); *H.P. Welch Co.* v. *New Hampshire*, 306 U.S. 79, 85 (1939). As the Court put the proposition in *Dublino, supra*, at 413: "The exercise of federal supremacy is not lightly to be presumed."

(3)

The typical instance of preemption is, of course, actual or arguable duplication by state or local law of federal coverage. In the field of labor law the prototypical pre emption doctrine is set out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-45 (1959) ("*Garmon*"), as follows:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . .
>
> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger

of state interference with national policy is to be averted."

Federal exclusion plus preemption of state or local jurisdiction means a no-man's land in the area of such exclusion and preemption. This distinctive and decisive aspect of this case is never mentioned or addressed by the Court below which, instead, reasoned (i) it was the intent of PL 93-360 to preempt the field of labor relations at non-profit health care facilities, subject only to cession by the NLRB to the states pursuant to NLRA § 10(a) [29 U.S.C. 160(a)] or § 14(c) [29 U.S.C. 164(c)], (ii) the NLRB determined house staff officers are not employees within the meaning of the NLRA and not entitled to collective bargaining, and (iii) since no jurisdiction was ceded by the NLRB to the s'ates, they are bound by the NLRB determination. But the central premise of the argument is that exclusion from coverage by the NLRB is preemptive even in the absence of any express or implied legislative mandate to exclude and preempt. The law is otherwise. See pp. 23-24 *infra*.

Deference to the state police power is not to be lightly preempted or ousted solely by reason of NLRA non-coverage. "Where the Board lacks jurisdiction because of statutory exclusions, preemption under the Act is not involved." American Bar Association Labor Relations Law Section, *The Developing Labor Law* 806 (Morris ed. 1971). Only if exclusion from federal coverage has been accompanied by some express or implied Congressional purpose to leave house staff matters unregulated by the states as well as the federal government can exclusion *and* preemption be found, and here no such claim is or could be made.

(4)

There is nothing in the legislative history of PL 93-360 to suggest preemption of the states in the absence of NLRA coverage of labor relations in health care facilities. There is, however, considerable evidence that it was believed that existing state legislation affecting voluntary hospital labor relations in New York and Minnesota should and would be continued in effect by the NLRB, pursuant to its cession powers under NLRA § 10(a) [29 U.S.C. 160(a)] after the enactment of PL 93-360, and that, accordingly, the NLRA in application would not preempt such state legislation even though NLRA coverage duplicated that of those states.[11]

The House Committee on Education and Labor, in commenting on an earlier version of PL 93-360, referred to existing state legislation on voluntary hospital labor relations and stated that it "urges the Board [NLRB] to exercise its authority . . . to cede jurisdiction" to those states. H.R.Rep. No. 92-1252, 92d Cong., 2d Sess., 6 (1972) ("1972 House Report"). That same 1972 House Report pointed out that "the committee wishes as little disruption as possible to existing patterns of collective bargaining . . ." *Id.* at 5-6. There was, therefore, no legislative purpose or intention to supersede viable state legislation affecting labor relations at voluntary hospitals, even where NLRA coverage was contemplated.[12]

The one instance where the Congress was confronted with the prospect of a no-man's land resulting from federal

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[11] See 120 Cong. Rec. S6942 (May 2, 1974) (Sen. Taft); S7311 (May 7, 1974) (Sen. Taft); S12105 (July 10, 1974) (Sen. Mondale and Williams); H6393 (July 11, 1974) (Rep. Thompson and Quie).

[12] The NLRB refused to cede jurisdiction to Minnesota in the area covered by PL 93-360. *In re Minnesota,* 219 NLRB No. 170 (1975). The NLRB refusal to cede jurisdiction does not diminish the expectation of the Congress that state legislation duplicating PL 93-360 would continue in effect, thus indicating no intention to vitiate such legislation.

exclusion and preemption by reason of PL 93-360, was with respect to house staff and there the Congress took steps to avoid that consequence. At the 1973 Hearings on S. 794 and S. 2292, 93d Cong., 1st. Sess. ("1973 Hearings"), representatives of house staff organizations, including the CIR, specifically warned that extension of the NLRA to house staff officers created the risk of their exclusion as supervisors and preemption of the applicable SLRA under NLRA § 14(a) so as to "disenfranchise" house staff and destroy existing house staff association organization and bargaining in New York. 1973 Hearings at 292-95, 349-53, 354; see also *id.* at 296-45, 355-63. The American Nurses' Association made the same point. *Id.* at 126.

The Congress responded by incorporating the following language in the relevant committees' reports:

> "Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of 'supervisor'. The Committee has studied this definition of 'supervisor'. The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board [NLRB] decisions. The Committee notes that the Board has carefully avoided applying the definition of supervisor to health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.

> The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations." [S. Rep. No. 93-766 93d Cong., 2nd Sess., 6 (1974); H.R. Rep. No. 93-1051; 93d Cong., 2d Sess., 5 (1974). See also 1972 House Report at 5.]

Since the house staff concern was that their medical supervision of others in the interests of patient care would exclude them from NLRA coverage as supervisors and result in total exclusion by reason of NLRA § 14 (a) [29 U. S. C. 164(a)], the committees' reports were clearly calculated to avoid the feared consequence of such total house staff exclusion.

Even more fundamental to the issue here, was the overwhelming purpose of the Congress in enacting PL 93-360 to avoid organizational strikes, to minimize and regulate impasse strikes by collective bargaining, mediation, and fact-finding, and to provide patient care safeguards in the event of strikes by requiring strike notice. Throughout the hearings, debates, and committee reports, PL 93-360 and its predecessor bills were considered, evaluated, and finally adopted in the context of its efficacy in dealing with patient-threatening voluntary hospital strikes.[13]

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[13] See Hearing on H.R. 11357 S.Comm. on Labor and Pub. Welfare, 92d Cong., 2d Sess. (1972) ("1972 Hearings"), at 141-45 (S. David Pomrinse, M.D.), 245 (Donald W. Dunn), 284 (George W. Yeckel), 269 (United States Chamber of Commerce), 297 (Association of Hospital Personnel Administrators of Greater New York); 1973 Hearings at 17-18, 94, 566-7 (Sen. Taft), 19, 29, 64-65, 68-70 (SEIU), 78-86 (chart of hospital strikes), 117 (ANA), 132-38 (American Hospital Association), 261 and 271 (Norman Metzger), 428 and 431 (Undersecretary of Labor Shubert), 561 (AF of L-CIO); S. Rep. No. 93-766, *supra*, at 1, 3, 6-7; H.R. Rep. No. 93-1051, *supra*, at 5; S.Conf. Rep. No. 93-988, 93d Cong., 2d Sess. (1974); 120 Cong. Rec. S6932-34 (Sen. Cranston) S6935 (Sen. Javits) S6940 (Sen. Taft) (May 2, 1974); H4587-88, 4593 (Rep. Thompson) H4588 (Rep. Ashbrook) H4589 (Rep. Ford) H4590 (Rep. Clay) (May 30, 1974); S12103-04 (Sen. Williams) S12106 (Sen. Cranston) S12109 (Sen. Taft) (July 10, 1974); H7249 (Rep. Thompson) H7250-54 (Rep. Ashbrook) H7255 (Rep. Badillo) (Aug. 7, 1974).

Against the background of this legislative history and purpose, it is inconceivable to attribute to Congress the intention to abide the condition which the NLRB seeks to effectuate here, *i.e.*, that house staff officers' labor relations and disputes, including strikes, be left wholly unchecked and unregulated.[14] Not a single witness, member of Congress, or committee report suggested such a no-man's land as to house staff labor matters. No one, including the NLRB, controverts the proposition that house staff officers are actively and substantially engaged in patient care, whether as employees or "primarily" as students. It is just such patient care at voluntary hospitals Congress intended to protect and safeguard. The foregoing intention is palpably disserved by the NLRB position sustained by the Court below here, and is clearly more nearly realized by SLRA coverage which would outlaw all house staff strikes and substitute for them collective bargaining rights and arbitration where collective bargaining fails.

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[14] Representative Frank Thompson (N.J.), author of P.L. 93-360, stated on November 29, 1976, at a subcommittee hearing dealing with oversight of the Health Care Amendments:

> "I am even more disturbed by the Board's just issued decision in the Kansas City General Hospital case and its decision to actively oppose any assertion of jurisdiction by State labor boards over housestaff employees. I am astounded by the Board's view that Congress not only intended to deny housestaff the benefits and obligations under the federal law but also to remove from them any and all preexisting rights and duties under state laws.
>
> I can't imagine Congress having intentionally acted in any such irresponsible fashion. We adopted the 1974 amendments to end strife in the health care industry, not to create it. Our purpose was to set up a civilized mechanism for resolving labor disputes at hospitals and to protect patient care, not to create a no-man's land for medical personnel and force them to back into primitive forms of unregulated economic warfare."

Hearings on H.R. 1584, Subcomm. on Labor, House Comm. on Education and Labor, 94th Cong., 2d Sess., 2 (1976).

The NLRB has left no doubt that it intends that no mechanism of government shall be available to deal with house staff labor relations or disputes. The majority of the NLRB does not take issue with, and evidently adopts the observations of present Chairman Fanning that the effect of the NLRB's house staff decisions "is that housestaff . . . organizational, recognitional, and bargaining strikes are no longer subject to the restraints on such activities that Congress enacted specifically to regulate such activities in the health care industry," and, further, that the majority of the NLRB is "seeking to preclude intervention by any state court or board, whether by making available procedures for the peaceful settlement of such disputes, or by injunction. Such disputes will be resolved solely in accordance with the militancy and economic resources of the contending parties, free of any restraining or mediatory influences of Federal or state law." *Kansas City General Hospital II* at 7-8.[15]

Chairman Fanning and, by implication, the rest of the NLRB are correct that preemption by default precludes state intervention. The failure of the voluntary hospitals, who claimed just such preemption, to seek any state court injunction of the CIR house staff strike of October 5-15, 1976 (A. 151-56), even though the CIR and those hospitals were in litigation in the state courts at that very time (see A. 152-53), underscores the apparent understanding of interested parties that preemption by exclusion precludes injunctive intervention.

In New York the authority to enjoin hospital strikes derives from the same statutory pattern which establishes

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[15] Nor did the NLRB majority dispute the comment of Member Fanning that his "colleagues have deprived these [Albert Einstein] interns and residents of any effective redress in any forum." *Albert Einstein College of Medicine*, 226 NLRB No. 185 (1976) at 7.

the rights and mechanisms for collective bargaining, thereby giving rise to serious questions whether house staff strikes can be enjoined pursuant to legislation from which such house staff are otherwise excluded by reason of pre-emption.[16] In any event, the New York experience with voluntary hospital strikes demonstrates the perceived need to permit collective bargaining,—not merely to authorize injunctions,—to deal effectively with such strikes. *Long Island College Hospital* v. *Catherwood*, 23 N.Y.2d 20, 31-32 (1968). New York has concluded that some system of mandated and regulated collective bargaining and resolution of grievances and disputes, not just denial of rights to those who are needful of a fair opportunity to negotiate matters essential to them, is the most, if not the only effective way to avoid strikes at hospitals.

The experience of the CIR here recorded is a case in point. On October 1, 1976, the CIR was confronted with a united front by the voluntary hospitals in their refusal to recognize or negotiate with the CIR, and the destruction of a long-standing collective bargaining experience. A. 151-52. The CIR was without any viable or timely remedy either before the NLRB, SLRB, or the state courts. A. 153. Obliged to choose between virtual destruction in the area of representation of voluntary hospital house staff or a strike, the CIR and the local house staff associations at twelve hospitals struck for periods up to ten days starting October 5, 1976. A. 154-55. If not for claimed exclusion of CIR-

[16] Under New York law, strikes arising out of labor disputes cannot generally be enjoined. Labor Law § 807. An exception is made for hospital strikes. Labor Law § 713. But the exception is part of the Labor Law Art. 20 providing for labor relations mechanisms generally and for such mechanisms in voluntary hospitals specifically. Moreover, since the Court below considers that "it is clear that Congress intended to include house staff within the coverage of" PL 93-360 (App. 45a), it would appear that state injunctive relief against a house staff strike would be unavailable. *NLRB* v. *State of New York*, 436 F.Supp. 335 (S.D.N.Y. 1977).

represented house staff from appropriate labor relations law coverage, the hospitals would have continued, as they did in the past, to recognize and to bargain with the CIR and no strike would have been necessary. A. 155-56. Indeed, if, as claimed by the CIR, the house staff represented by the CIR was deemed covered by the SLRA, a recognitional strike would have been unlawful and enjoinable under the SLRA. Labor Law § 713.

The NLRB position here urged and sustained below, then, necessarily relegates house staff organizations, threatened with extinction by non-recognition, to recognitional strikes instead of to the peaceful and orderly recognitional machinery provided by the SLRA. In view of the clear and unqualified legislative purpose, in the enactment of PL 93-360, to avoid patient-threatening strikes at voluntary hospitals, the CIR experience confirms that it is state coverage and not the NLRB mandated no-man's land which best comports with the intent of PL 93-360.

(5)

The NLRB creation of a no-man's land in house staff labor relations, in the absence of and contrary to any Congressional mandate or intention to that effect, conflicts with the decisions of this Court. Without exception, this Court has required the showing of a legislative instruction or purpose that there be a no-man's land before foreclosing all coverage or effective regulation of a vital area of labor activity. *Machinists* v. *Wisconsin Emp. Rel. Comm'n.*, 427 U.S. 132, 141 (1976); *NLRB* v. *Insurance Agents*, 361 U.S. 477, 488-89 (1960); *Garmon, supra*, at 244. See also: *Farmer* v. *United Brotherhood of Carpenters, etc.*, 430 U.S. 290 (1977); *Machinists* v. *Gonzales*, 356 U.S. 617 (1958); *Automobile Workers* v. *Russell*, 356 U.S. 634 (1958); *Youngdahl* v. *Rainfair Inc.*, 355 U.S. 131 (1957);

Automobile Workers v. *Wisconsin Emp. Rel. Board.*, 351 U.S. 266 (1956); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656 (1954). The same rule obtains in those state cases where, again uniformly, exclusion from NLRA coverage was held to provide the predicate for, not proscribe state coverage in the absence of an express or implied Congressional purpose to foreclose state coverage so as to create a no-man's land. *Wisc. Empl. Rel. Comm'n.* v. *Atlantic Richfield Co.*, 52 Wis. 2d 126, 187 N.W.2d 805 (Sup. Ct. 1971) (one-man unit); *Baggett Transportation Co.* v. *Teamsters*, 289 Ala. 666, 270 So. 2d 800 (Sup. Ct. 1972) (independent contractors); *United Farm Workers Organizing Committee* v. *Superior Court*, 4 Cal. 3d 556, 22 Cal. Rptr. 877 (Sup. Ct. 1971) (agricultural workers);[17] *Willmar Poultry Co.* v. *Jones*, 430 F.Supp. 573 (D.Minn. 1977 (agricultural workers); *Foods, Inc.* v. *Leffler*, 240 N.W.2d 914, 92 LRRM 3249 (Iowa Sup. Ct. 1976) (agricultural workers); *M & H Fruit & Vegetable Corp.* v. *Doe*, 80 Misc. 2d 1012, 364 N.Y.S.2d 413 (Sup. Ct. N.Y. County 1975) (agricultural workers); *Jackson & Perkins*, 14 New York SLRB No. 70 (1951) (agricultural workers). The ruling below is in conflict with the cited decisions of this Court and of the states on the underlying issue whether the states are here preempted from regulating house staff labor relations solely by reason of the exclusion of such matters by the NLRB from NLRA coverage.

(6)

The prevalent federal purpose to achieve uniformity in labor relations matters does not provide the purpose, necessary here to sustain the NLRB and the Court below, to

[17] California now specifically provides labor relations coverage only for those agricultural workers "excluded from the National Labor Relations Act." Cal. Code Ann., *Labor Code*, § 1140.4(b) (West's 1971). Seven states provide coverage for agricultural workers. *Willmar Poultry Co.* v. *Jones*, *supra*, 430 F.Supp. at 578 n. 5.

create a no-man's land. Preemption by actual or potential coverage, for reasons of uniformity of coverage, obviously raises very different considerations than does preemption in conjunction with non-coverage. Bratton, *op. cit. supra*, 75 *Colum.L.Rev.* at 653-54. Thus federal NLRA coverage of local and state employees would, if constitutionally permissible, preempt state coverage; but no one suggests that the exclusion of public employees from NLRA coverage pursuant to NLRA § 2(2) [29 U.S.C. 152(2)] preempts their coverage under the vast number of state and local public employment labor relations laws which provide coverage. Because of the undisputed state and local government jurisdiction over the labor relations of their employees, it is frivolous to suppose any policy or prospect of national uniformity in denying statutory coverage of house staff labor relations. Almost 45% of house staff officers are at public institutions, many of which allow house staff to organize and bargain collectively pursuant to state and local law.[18]

Nor is uniformity as grounds for preemptive exclusion on any better footing if it reflects concern that a single

[18] It is uncontradicted here that approximately 45% of all interns are employed at public institutions (A. 156), and that major house staff organizations at Los Angeles County Hospital, California, Cook County Hospital, Illinois, and the University of Michigan [see *Regents* v. *MERC*, 389 Mich. 96, 204 N.W.2d 218 (Sup. Ct. 1973)], are engaged in collective bargaining covered by and pursuant to state or local laws governing public employee labor relations (A. 156). Such public hospital house staff coverage was recently sustained in Massachusetts [*Cambridge Hospital*, BNA, *Gov't. Employees Relations Reporter*, No. 658, E-1 (May 24, 1976)], Nebraska [*House Staff Officers* v. *U. of Neb. Med. Ctr.*, 95 LRRM 3346 (1977)], New York State [*In re County of Erie*, 9 New York PERB 3051 (1976)], Westchester County [*Matter of CIR*, Case No. 004-75 (June 1, 1977)], and New York City [*In re Doctors Association*, New York City OCB Decision No. 31-73 (1973)]. The record confirms that the CIR is engaged in collective bargaining with New York City on behalf of New York City municipal hospital house staff officers. A. 156.

hospital may be subject both to state and federal labor relations regulations which may differ in some respects. We know of no case before this one which holds that such circumstances oust a state of jurisdiction in an area not otherwise preempted by coverage under the federal law. An employer engaged in interstate commerce, and thus covered by the NLRA, is obviously also subject to state labor laws with respect to employees excluded from the NLRA. That was exactly the case in *Jackson & Perkins, supra.* An employer of NLRA-excluded agricultural or household or family member workers [NLRA § 2(3), 29 U.S.C. 152(3)], who may be subject to an applicable state law covering such workers, can and frequently does also employ others covered by the NLRA and is thus subject to both the NLRA and the state law.[19] Yet no such situation, necessarily frequent, has been held to involve proscribed conflict. Multiplicity of regulation is no bar to the exercise by a state of its legitimate interest in labor regulation.

(7)

Bethlehem Steel Co. v. *New York State Labor Relations Board,* 330 U.S. 767 (1947) (*"Bethlehem Steel"*), heavily relied upon by the Court below, does not sustain the proposition that NLRB exclusion of house staff labor relations from NLRA coverage necessarily implicates preemption and ouster of state coverage of house staff labor relations. In *Bethlehem Steel* it was held inappropriate for the SLRB to designate a unit of foremen for employers covered under the NLRA at the very time that the NLRB had refused to

[19] Chairman Fanning pointed out that "our experience with agricultural employees and all their employees, both those engaged in the agriculturally related functions and those not (*e.g.*, a winery's office clericals), sufficiently undermines [the] notion that Federal regulation of some hospital employees (the non house staff kind) cannot exist alongside state regulation of other hospital employees (house staff)." *St. Clare's* at 20.

establish such a unit because the NLRB had determined that establishment of such a unit would frustrate the purposes of the NLRA. Correctly understood *Bethlehem Steel* involves not preemption by mere exclusion, but preemption by reason of conflict in an area of NLRA coverage. In the brief of the Solicitor General submitted as *amicus* by special leave of the Court, the Solicitor urged that the indicated conflict between the NLRB and the SLRB resulted in a subversion of the integrity of the collective bargaining process of those employees covered under the NLRA (at pp. 18, 24-25, 29-31, 36-37). Mandated collective bargaining with supervisors who are surrogates of, and owe loyalty to management, according to the NLRB and the Solicitor in *Bethlehem Steel,* threatened the proper roles of union and management in all aspects of NLRA-covered collective bargaining. In this context the *Bethlehem Steel* holding becomes clear and here inapplicable.

Bethlehem Steel can only be read to foreclose conflict in an area clearly preempted by and covered under the NLRA, and not to mean that mere exclusion of supervisory employees, such as foremen, by the NLRB preempts SLRB jurisdiction over such personnel. *Hanna Mining Company* v. *District 2 MEBA,* 382 U.S. 181 (1965), which followed but never mentioned *Bethlehem Steel,* cannot otherwise be reconciled with *Bethlehem Steel.* For in *Hanna* the post-*Bethlehem Steel* § 14(a) statutory exclusion of supervisors from the definition of employees was held not to preempt state jurisdiction over those supervisors where no conflict with respect to covered employees resulted from the state exercise of jurisdiction. See also *Beasley* v. *Food Fair of North Carolina, Inc.,* 416 U.S. 653 (1974). The proper reading of *Bethlehem Steel* limits its preemptive effect to exclusions necessary and fundamental for the collective bargaining by those covered by the NLRA, a condition not claimed by the NLRB here in the case of house staff collective bargaining.

(8)

Bethlehem Steel is here not applicable for still other historical and constitutional reasons. Since *Bethlehem Steel* the Congress has made clear that it is the Congress, not the NLRB, which determines whether a no-man's land shall be created in labor relations matters.

In 1947, very shortly after *Bethlehem Steel,* Congress amended NLRA §§ 2(3) and 2(11) to exclude supervisors from the definition of "employee" under the NLRA [61 Stat. 137, 29 U.S.C. 152(3) and 153(11)] and enacted NLRA § 14(a) [61 Stat. 151, 29 U.S.C. 164(a)] to specify that Supervisors were not to be covered "as employees for the purpose of any law, *either national or local,* relating to collective bargaining." (Emphasis Added.) In enacting NLRA § 14(a) Congress expressly mandated state and local non-supervisors were not to be covered "as employees for the purpose of any law, *either national or local,* relating to collective bargaining" (Emphasis added.) In enacting NLRA § 15(a) Congress expressely mandated state and local non-coverage of supervisors and did not rely upon any inference of preemption to be drawn from the exclusion of supervisors pursuant to NLRA § 2.

In 1959 the Congress was confronted with *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1 (1957), which held that the NLRA created a no-man's land where, as here, the NLRB declined but did not cede jurisdiction to a state, and *Office Employees Union* v. *NLRB,* 353 U.S. 313 (1957), and *Hotel Employees Local* v. *Leedom,* 358 U.S. 99 (1958), where the Court held that the NLRB was not empowered to decline jurisdiction over employers in an entire industry. NLRA § 14(c) [73 Stat. 541, 29 U.S.C. 164(c)] was enacted to grant the NLRB the power so to decline jurisdiction in certain circumstances [§ 14(c)(1)], but specified that upon such declination by the NLRB the states were not barred "from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction" [§ 14(c)(2)]. This Court noted that "the problem to which § 14(c) is addressed is the no-man's land created by" *Guss, supra. McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, 20 n. 10 (1963). The legislative history of NLRA §14(c)(2) leaves little doubt that Congress intended to eradicate that no-man's land:

> "Mr. ERVIN. Mr. President, we have a condition which is a stench in the nostrils of justice. It has been a stench in the nostrils of justice for years, and the Congress has met time after time and has done nothing to remedy it.
>
> This condition was brought about by Congress. Congress passed the Taft-Hartley Act and took jurisdiction over labor controversies from the States. After Congress set up the National Labor Relations Board, the courts said that since Congress had given jurisdiction over labor controversies, under the Taft-Hartley Act, to the National Labor Relations Board, the State courts could not exercise jurisdiction.
>
> As a result, we have observed people who had legal rights for which they could obtain no remedy. We have observed people suffer labor wrongs for which they could obtain no redress. I say it is a disgrace to any system of law for a person to have rights which cannot be remedied and wrongs which cannot be redressed." [105 Cong. Rec. S. 6544-45 (April 23, 1959).]
>
> "Mr. KENNEDY. What we intend to do is to fill the vacuum, not to continue it. . . ."
>
> • • •
>
> "We attempted to secured adoption of the Prouty amendment, for which I voted. It provided that in

the so-called no-man's land, the State courts and State agencies would administer the Federal law. But that amendment was not accepted.

Therefore, it seems to me that we did the next best thing; we provided that the States could assume jurisdiction in that area; but we made sure that the Board would not reverse itself and reject cases over which it now assumes jurisdiction." [*Id.* at S. 6548 (April 23, 1959), S. 17902 (Sept. 3, 1959).]

"Mr. McCLELLAN. That is what is wrong now. The Board can now take jurisdiction or not take jurisdiction, according to its discretion; and, in effect, we have a no-man's land, in which there are grievous wrongs and no remedy under American jurisprudence as of this time."

". . . Now the Federal Government has taken jurisdiction and will not use it. I say the Federal Government should make its choice. It should either use the jurisdiction it has or should turn it back to the States. The question is that simple." [*Id.* at S. 6413 (April 21, 1959), S. 6551 (April 23, 1959).]

• • •

"Mr. President, judging from the colloquy I have heard today on the no-man's land, we must keep this in mind: Up until 2 years ago, when the Guss decision was handed down by the Supreme Court we had no such thing as a no-man's land. The State courts were taking care of those cases, and there was no problem in the field. So we are not trying something new. Mr. President; we are merely going back to that which was in effect all the years we have had labor law up until 1957, when the Guss

decision of the Supreme Court preempted the State area." [*Id.* at S. 17904 (Sept. 3, 1959).]

"Mr. DIRKSEN. . . . [T]he so-called no-man's land difficulty we have encountered under the National Labor Relations Board . . . was a good deal like the fellow up in Tewksbury, Mass., who at a ripe old age passed away. He went to Heaven and St. Peter said, 'You can't stay here.' Then he went down below, and the Devil said, 'Sorry, you can't stay here.' Then with some frustration, the old gentleman said, "What will I do?' and the Devil said, 'You will have to go back to Tewksbury." [*Id.* at S. 6413 (April 21, 1959).]

[And see generally 105 Cong. Rec. S. 17898-904 (Sept. 3, 1959), S. 6409-13 (April 21, 1959), S. 6515-51 (April 23, 1959).]

The NLRB, in discussing the new NLRA § 14(c), said:

"These parallel provisions [NLRA §§ 14(c)(1) and (2)] are intended to bridge the 'no-man's land' between Federal and State jurisdictions, which formerly existed because State authorities had been held without power to act in cases in which the Board had, but did not, exercise jurisdiction under its established standards." [25 *NLRB Annual Report* 18 (1960).]

(9)

We do not see how, in the light of the history since *Bethlehem Steel*,[20] that case may now be used to establish

[20] ". . . the *Landrum-Griffin* history points unmistakably to the conclusion that Sec. 14(c) (2) was thought to be the total demise of the jurisdictional no-man's land the Board, here, seeks to create. The historical forces at work on *Bethlehem's* applicability here probably account for the fact that the Supreme Court has not cited it in over

that the NLRB can, without the semblance of legislative authorization to do so, foreclose all coverage, national or local, of house staff labor relations or disputes. The Court below thought the matter a simple syllogism: Congress could deny house staff collective bargaining rights under state law; Congress delegated its powers to the NLRB; the NLRB could completely oust state jurisdiction. Our federalism cannot be reduced to such a formula.

The power of Congress to preempt and oust the states of jurisdiction in matters of vital state concern derives from the constitutional premise that the "people of all the states, and the States themselves are represented in Congress" [*McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 435 (1819)] so that Congress is "subject to political restraints which can be counted on to prevent abuse" [*Helvering* v. *Gerhardt,* 304 U.S. 405, 412 (1938)].[21] The NLRB is not the constitutional equivalent of the Congress for purposes of preemption, particularly where total non-coverage results, except where the Congress so prescribes or intends.[22]

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14 years, as far as I can determine, see *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U.S. 714, 724 (1963), and then for a proposition which undermines my colleagues' argument. They probably also account for the fact that *Bethlehem* is not mentioned in the watershed preemption case, *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), nor in the two cases which authoritatively outline and trace the development of the preemption doctrine. *Local 76, International Association of Machinists & Aerospace Workers, AFL—CIO* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976), and *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America,* v. *Lockridge,* 403 U.S. 274 (1971)." (Fanning dissent in *St. Clare's* at 20 n. 37.)

[21] See, generally, Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Colum. L. Rev.* 543 (1954).

[22] *Office Employees International Union Local No. 11* v. *NLRB,* 353 U.S. 313, 320 (1957); *American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 315-16, 318 (1965); *NLRB* v. *Insurance Agents,* 361 U.S. 477, 490, 499-500 (1960); *McCulloch* v. *Sociedad Nacional, supra,* at 22.

Before the states can be denied any and all regulation, national or local, of hospital-house staff labor relations directly impacting upon the care and lives of hospital patients, the Congress speaking as and for the states must make that decision, not the NLRB. And precisely because of the careful, deliberative and frequently slow process of the Congress, which assures that the states will not be lightly caused to endure a no-man's land where effective regulation is clearly necessary, it would be improper to permit the NLRB first to foreclose all regulation and then wait and rely upon Congress to undo that which it has not authorized. The NLRA is not "a charter for the National Labor Relations Board to act at large." *NLRB* v. *Insurance Agents, supra,* at 490.

(10)

If the decision below is not in conflict with the decisions of this Court or with applicable state decisions on an important state question, it surely involves an important question of federal law which has not been, but should be settled by this Court. We know of no prior case where the NLRB, as distinct from a court, asserted the power as a matter of "national labor policy" to preempt the states from exercising jurisdiction over a group excluded by the NLRB from NLRA coverage. The implications of the decision below are truly staggering. The NLRB, acting by a tenuous and uncertain majority (see pp. 10-12, *supra*), claims and the Court below grants the NLRB the autonomous power, equal to that of the Congress, to exclude from all labor relations statutory coverage,—national or state,—as a matter of national labor policy, any relationship with "characteristics" of employment which the NLRB considers is "primarily" some other kind of relationship whose nature and

mission are incompatible with collective bargaining.[23] Teaching could become "primarily" education, not employment; working for a law firm, "primarily" practice of law; service at a hospital by a nurse or physician, "primarily" patient care; producing an article of craft or art, "primarily" craftsmanship or artistry; etc. No matter the power of the Congress to make such determinations and to bind the states thereby, the decision of the Court below vesting the identical power in the NLRB warrants review by this Court before it becomes doctrine.

II.

The decision below, to the extent that it attributes to the NLRA the power to preclude all labor relations law coverage, state as well as federal, of house staff labor relations or disputes, has, by reason of the Tenth Amendment to the United States Constitution, decided an important state question in a way in conflict with applicable state law; has decided a federal question in a way in conflict with applicable decisions of this Court; and, at the least, has decided an important question of federal law which has not been, but should be settled by this Court.

This Court has recently reaffirmed the doctrine that state exercise of traditional government functions, such as police protection and public health, cannot be pre-empted by federal authority. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), held that, pursuant to the Tenth Amendment, the 1974 amendments to the Fair Labor

[23] In addition, since such determinations are made by the NLRB in the context of a representation proceeding, not an unfair labor practice proceeding reviewable under NLRA § 10(f) [29 U.S.C. 160(f)], the NLRB has moved to dismiss challenges to those determinations in a pending action, on the grounds that they are non-reviewable. *Physicians National Housestaff Association* v. *Murphy*, D.D.C. Civ. No. 77-0358. Such non-reviewability could implicate non-preemption. See *Vaca* v. *Sipes*, 386 U.S. 171, 181-83 (1967).

Standards Act were unconstitutional in their attempt to prescribe minimum wages and maximum hours paid by the states in their sovereign capacities:

> "[E]ven if we accept appellee's assessments concerning the impact of the amendments, their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by State and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the State the authority to make these fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little of the State's 'separate and independent existence.' *Coyle* [v. *Smith*], 221 U.S. [559], at 580 [(1911)]." (426 U.S. at 851.)

We believe it not consistent with the Tenth Amendment, as construed by this Court in *Usery*, for Congress to withhold its hand from house staff labor matters, including strikes, and simultaneously preclude any state from dealing with those matters. Whatever other power Congress may have, the minimum meaning of the Tenth Amendment, and the powers thereby reserved to the states and the people, must be that that power of the Congress cannot mandate no action or ineffective action both by Congress and the states in a matter directly affecting the lives and health of those people in such states who are

hospital patients. For reason already discussed, we think it clear that no such default in responsibility was intended by the Congress. But if this Court should agree with the NLRB that the combined effect of PL 93-360 and *Cedars-Sinai* was to move disputes between voluntary hospitals and their house staff from collective bargaining tables to the streets, with no power by the states to substitute labor negotiations for labor strife whereby lives and health of patients are placed at risk, then even if that effect was prescribed and intended by Congress it may not prevail over the purpose of the State of New York, in its SLRA, to deal with such matters at a lesser risk to its people. *National League of Cities* v. *Usery, supra.*

It is not hyperbolic to say that the Congress can no more mandate the non-punishment, by federal, state, or local government, of murder in interstate commerce than it can mandate non-regulation, by federal, state, or local government, of house staff labor disputes in the name of interstate commerce. This must be the least reserved to the states and the people thereof by the Tenth Amendment. As Mr. Justice Marshall said in dissent in *Fry* v. *United States,* 421 U.S. 542, 547 n.7 (1975), "[the Tenth Amendment] expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76 Civ. 5119

NATIONAL LABOR RELATIONS BOARD,

Plaintiff,

Against

COMMITTEE OF INTERNS AND RESIDENTS, AND THE NEW YORK STATE LABOR RELATIONS BOARD,

Defendants.

MEMORANDUM

STEWART, *District Judge:*

Plaintiff National Labor Relations Board ("NLRB" or "the Board") has brought this action in federal court seeking to enjoin defendant Committee of Interns and Residents ("CIR") from attempting to require co-defendant New York State Labor Relations Board ("SLRB") to assert jurisdiction over any of the unfair labor practice charges and the representation petition filed by the CIR against various voluntary, non-profit hospitals in the New York City area. The CIR is a labor organization whose members are physicians working in training programs as interns, residents and clinical fellows ("housestaff") in these hospitals. Plaintiff also seeks to enjoin defendant SLRB from considering, or in any way asserting jurisdiction over, these labor disputes. Plaintiff seeks this relief on the

ground that this area of labor relations has been preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 *et. seq.* ("NLRA" or "the Act") and is within the exclusive jurisdiction of the NLRB. Plaintiff also seeks a declaratory judgment that these matters are preempted by the aforementioned federal statute.

Defendant CIR has cross-moved for summary judgment alleging that this court lacks jurisdiction over the subject matter of this action and that, on the merits, the NLRA has not preempted this area of labor relations. Defendant SLRB has taken no position, but has informed the Court that it will comply with the judgment of this Court or any other court of competent jurisdiction.[1]

FACTUAL BACKGROUND

The question presented by this action is whether housestaff physicians, working and training in voluntary non-profit hospitals in New York State, may be covered under the New York State Labor Relations Act, Labor Law § 700 *et seq.* (McKinney's 1965) ("SLRA"), or whether they are covered exclusively by the NLRA.

Section 701(12) of the Labor Law extends the coverage of the SLRA to "any person employed or permitted to work by or at a non-profitmaking hospital or residential care center." The SLRB has interpreted this to include

[1] Albert Einstein College of Medicine and Misericordia Hospital Medical Center moved to intervene as plaintiffs under Rule 24(b) of the Federal Rules of Civil Procedure. On December 13, 1976, this Court denied the motion to intervene, but granted leave for the hospitals to appear as *amici curiae*. The Court has also allowed the Association of American Medical Colleges to file a brief as *amicus curiae*.

housestaff. *Long Island College Hospital*, 33 SLRB No. 32 (1967); *Brooklyn Eye and Ear Hosiptal*, 32 SLRB No. 21 (1966). For a considerable period of time, the SLRB and hosiptals have recognized the CIR (as provided by § 705 of the SLRA), as the exclusive bargaining representative of housestaff physicians in a substantial number of voluntary, non-profit hospitals in the New York City area. During this time, the CIR has negotiated collective bargaining agreements on behalf of its members with these hospitals.

Prior to 1974, there was no conflict between this coverage under the SLRA and the NLRA, because the NLRA had excluded from its definition of "employer" any "corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" (repealed 29 U.S.C. § 152(2)). However, effective August 25, 1974, Congress deleted this exclusion from § 152(2), and extended the coverage of the NLRA to any "health care institution" which is defined as

> . . . any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged person . . . 29 U.S.C. § 152(14).

There appears to be no dispute that this amendment brought labor relations between voluntary, non-profit hospitals and their "employees" as defined in Section 2(3) within the jurisdiction of the NLRA. This by no means, though, disposes of the question of whether housestaff physicians are within the exclusive jurisdiction of the NLRA.

The NLRB first considered the situation of housestaff in *Cedars-Sinai Medical Center*, 223 NLRB No. 57, 91

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LRRM 1398 (March 19, 1976), and concluded (with Member Fanning dissenting at length) that

> . . . interns, residents, and clinical fellows, although they possess certain employee characteristics, are primarily students. Accordingly . . . we conclude that the interns, residents and clinical fellows . . . are not "employees" within the meaning of Section 2(3) of the Act. *Id.* at 3.

In light of this conclusion, the NLRB found that the Cedars-Sinai Housestaff Association, which was comprised solely of housestaff physicians, was not a labor organization within the meaning of § 152(5) of the NLRA. The NLRB then dismissed the Association's petition to certify a bargaining unit of housestaff physicians on the ground that it presented "no question affecting commerce . . . concerning the representation of 'employees' of the Employer within the meaning . . . of the Act" 223 NLRB No. 57 at 8. This view was adhered to without modification in a number of subsequent cases involving housestaff in hospitals around the country.[2]

Following this decision, Misericordia Hospital Medical Center refused to recognize or bargain with the CIR, so the CIR petitioned the SLRB for certification based on the CIR's claim that it represented a majority of the housestaff at Misericordia. In addition, other hospitals, where the CIR had been recognized and certified as the exclusive bargaining representative for housestaff, also refused to bar-

[2] *Wayne State University*, 226 NLRB No. 168 (1976); *Buffalo General Hospital*, 224 NLRB No. 17, 92 LRRM 1197 (1976); *St. Clare's Hospital*, 223 NLRB No. 163, 92 LRRM 1001 (1976); *University of Chicago*, 223 NLRB No. 154, 92 LRRM 1039 (1976); *St. Christopher's Hospital*, 223 NLRB No. 58, 91 LRRM 1417 (1976).

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gain with the CIR, so the CIR filed with the SLRB unfair labor practice charge against these hospitals. In all these cases, the hospitals refused to recognize or bargain with the CIR because of the NLRB's ruling in *Cedars-Sinai*. Further, the hospitals objected to the proceedings before the SLRB on the ground that the 1974 health care amendments to the NLRA had preempted state regulation of labor relations in the health care field.

While these proceedings were pending before the SLRB, the NLRB issued its decision in *Kansas City General Hospital*, 225 NLRB No. 14 (June 24, 1976), in which it reiterated the *Cedars-Sinai* finding that housestaff physicians are not "employees" within the meaning of the NLRA, and concluded that the hospital there involved was

> . . . not an "employer" within the meaning of Section 2(2) of the Act for the purposes of any disputes relating to such personnel.

In the CIR proceedings before the SLRB, the jurisdictional issue was briefed, and on July 14, 1976, the SLRB dismissed the representation petition stating:

> The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments can be, and have been made on both sides of this issue. On balance, we have concluded that further processing of this matter before this Board is not waranted at this time. *Misericordia Hospital Medical Center*, 39 SLRB No. 32.

The unfair labor practice charges against the other hospitals were also dismissed for the same reason.

The CIR then commenced a number of Article 78 proceedings (New York CPLR § 7801 *et seq.* (McKinney's

1963)) in New York State Supreme Court asking the Court to vacate the SLRB's dismissals and order the SLRB to assert jurisdiction over the CIR's claims. Initially, the SLRB alone was named as defendant in these state court actions. However, a number of hospitals moved to intervene as defendants and did so by stipulation of the parties. Thereafter, the intervenors sought to remove several of the actions to federal court. Their petitions were denied on September 28, 1976 by Judge Brieant of this Court on the ground that the federal preemption question was not presented as part of the plaintiff's claim in state court, but only appeared as a defense, so there was no federal jurisdictional basis for removal. 28 U.S.C. § 1441.

Upon remand, Justice Gellinoff of the New York State Supreme Court vacated the SLRB's determinations dismissing the CIR's representation petition and unfair labor practice charges, and remanded them to the SLRB for further consideration. Justice Gellinoff concluded that, in light of 1) the NLRB's finding in *Cedars-Sinai* concerning the "employee" status of housestaff physicians, 2) its further determination in *Kansas City* that hospitals were not "employers" within the meaning of the NLRA for the purpose of disputes relating to housestaff, and 3) the absence of any language either in the NLRA or the Board's decision indicating the intention that "these vital members of the hospital's working staff should be bereft of any labor regulation at all,"

> . . . the jurisdiction of respondent State Board over disputes between petitioner and the intervening hospitals is unaffected by the 1974 amendments to the National Labor Relations Act, and therefore the Board retains the same jurisdiction it previously possessed. 93 LRRM 2540 (October 14, 1976).

In response to Justice Gellinoff's decision, the NLRB *sua sponte* reconsidered and revised its opinion in *Kansas City*. In its revised order of November 8, 1976, the Board (Member Fanning dissenting) announced that it would delete the finding in its original decision that the hospital was not an "employer" under the NLRA for the purposes of any disputes relating to housestaff, and that it relied simply on the *Cedars-Sinai* holding that housestaff are not "employees" under the NLRA as grounds for dismissing the union's petition. The Board then directly addressed the preemption question presented in the instant case, and concluded that there was federal preemption of labor relations in the health care field. The Board stated:

> Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, *inter alia*, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in *Cedars-Sinai*, by finding residents, interns and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put

> hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy. 225 NLRB No. 14A at 4-5 (footnotes omitted).

This action was commenced by the NLRB on November 16, 1977. The Court has been informed that there is no other federal action pending in which the NLRB's ruling on federal preemption in *Kansas City* is directly being reviewed (Transcript of December 10, 1976 hearing pp. 55-6).

An appeal from Justice Gellinoff's decision was taken by the defendant hospitals and was pending before the New York State Supreme Court, Appellate Division, when this federal action was filed. However, in light of the Board's revised decision in *Kansas City*, several of the hospitals also moved to reargue before Justice Gellinoff. On January 6, 1977, the motion was granted and Justice Gellinoff vacated his previous decision and dismissed the CIR's petitions on the ground that he was bound by the Board's subsequent ruling on preemption. On January 20, 1977 Justice Gellinoff denied the CIR's request that he reconsider his January 6, 1977 ruling. The Court has been informed that the CIR has filed a notice of appeal from the dismissal, and that the Appellate Division has provided for an expedited briefing schedule and oral argument in early March (January 26, 1977 letter of Daniel Riesel representing *amicus* Albert Einstein College of Medicine).

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1337 as the action arises under the NLRA, 29 U.S.C. § 151 *et seq*. The CIR has asserted, however, that

this Court lacks subject matter jurisdiction on the grounds that 28 U.S.C. § 2283 bars this Court from granting either the injunctive or declaratory relief sought and that no exception to § 2283 is applicable here. The CIR further contends that this Court is barred by principles of federalism and equity from granting the injunctive relief sought.

First, we agree that the relief sought in this case does fall within the prohibition of § 2283 which states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Here, defendant CIR initiated state court proceedings, long before this case was filed, in which it sought review of the SLRB's dismissal of the CIR's representative petition and unfair labor practice charges and a determination that the SLRB did have jurisdiction over the CIR's labor disputes with the hospitals. These state court proceedings are still pending—at this point at the appellate level—where the trial court's dismissal of the CIR's petitions is under review.

The direct impact of this court issuing the injunction sought would be to restrain the CIR from continuing to assert its rights in these state court proceedings. This puts the injunctive relief sought within the structures of § 2283. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970); *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940). Section 2283 applies as well to the declaratory relief sought. *Thiokol Chemical Corp.* v. *Burlington Industries*, 448 F.2d 1328 (3d Cir.) *cert. denied* 404 U.S. 1019

(1971); *accord, Samuels* v. *Mackell,* 401 U.S. 66 (1971); *Gajon Bar & Grill* v. *Kelly,* 508 F.2d 1317 (2d Cir. 1974).

There are a number of exceptions to the prohibition set forth in § 2283, three of which appear in the statute itself. None of these is urged by the parties as having application here. However, plaintiff contends that the exception developed in *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138 (1971) does apply in this case. The CIR disagrees.

In *Nash-Finch,* the Supreme Court held that the NLRB had "implied authority . . . in spite of the command of § 2283, to enjoin state action where its federal power preempts the field" (404 U.S. at 144).

In *Nash-Finch,* as here, no proceedings were pending before the Board involving the activities which the Board sought to enjoin the state court from regulating. Instead, the Board's claim there, as here, was based on its general assertion that the conduct which the state sought to regulate was governed exclusively by the NLRA. In a procedural context, then, very similar to that present here, the Supreme Court in *Nash-Finch* found that the Board had the implied authority to seek injunctive relief against preempted state action.

The CIR claims that the *Nash-Finch* exception of § 2283, however, should not apply in the instant case because here the existence of federal preemption is the heart of the controversy between the parties, while in *Nash-Finch,* according to the CIR, preemption was "posited and apparently not contested" (CIR Memorandum p. 15). While Justice Douglas writing for the majority, did find in *Nash-Finch* that "the exclusiveness of the federal domain is clear," (404 U.S. at 147) we do not think that the Court's holding depended on the preemption issue being uncontested. In fact, judging from comments made by Justice White in his dissent, this issue was not uncontested (*Id.* at 154-156).

The Supreme Court's analysis in *Nash-Finch* began with its finding that the purpose of the NLRA

> . . . was to obtain "uniform application" of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Id.* at 144.

The Court recognized the special position of the NLRB, as "the sole protector of the 'national interest' " (*Id.* at 145), as defined by the NLRA, and concluded that an exception to § 2283 existed for the NLRB when it was acting in its capacity as "protector" of the national interest, and seeking to protect federal rights and policies from improper regulation by the state. The § 2283 exception was proper under these circumstances, because:

> The purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights. We can no more conclude here than in *Leiter* [*Minerals, Inc.* v. *United States,* 352 U.S. 221 (1957)] that a general statute, limiting the power of federal courts to issue injunctions, had as its purpose the frustration of federal systems of regulation. The frustration of superior federal interests by the general language of § 2283 cannot reasonably be imputed. *Id.* at 145 (citations omitted).

We think this rationale applies as much where federal preemption may have been conceded as where it is contested by the parties, and ultimately found by the court. Once the court determines that the Board's preemption

claim is not frivolous (as it clearly is not here), it may entertain the Board's action seeking injunctive relief under the *Nash-Finch* exception to § 2283's jurisdiction bar.[3]

Accordingly, we find that the exception to § 2283 articulated in *Nash-Finch* applies in the instant case, and this court has jurisdiction over the subject matter of this action.

The CIR further argues that we should decline to exercise our jurisdiction because "considerations of federalism, comity and the adequacy of state remedies mandate equitable restraint" (CIR Memorandum p. 16).

The Supreme Court has indicated that, even where there is an exception to the anti-injunction statute, the principles of equity, comity and federalism must still be considered by a federal court when asked to enjoin a state court proceeding. *Mitchum* v. *Foster*, 407 U.S. 225 (1972). The weight which these elements must be given when the state proceeding is criminal has been extensively analyzed by the Court in *Younger* v. *Harris*, 401 U.S. 37 (1971) and its companion cases. Concerning the application of the *Younger* doctrine to state civil cases, Justice Stewart, concurring in *Younger*, stated:

> Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than

[3] The concerns expressed by Justice White, dissenting in *Nash-Finch*, do not militate against this conclusion. He urged that if, contrary to his view, the Board did have power to seek an injunction to prevent state interference in activities preempted by federal law, it should not be able to obtain this relief simply by "the mere conclusory allegation that such rights are 'arguably' protected" (*Id.* at 154), but should be entitled to the relief only if it "persuades a federal court that the state decree is actually interfering with rights protected by federal law" (*Id.* at 156). Thus even the dissent envisioned the jurisdictional doctrine expressed in *Nash-Finch* as applying where the preemption issue was not initially settled, and simply argued that the higher standard of proof was necessary in order for the court to grant the injunctive relief sought.

> in civil cases. . . . The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute. 401 U.S. at 55 n. 2 (citations omitted).

In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), Justices White and Blackmun and Chief Justice Burger indicated, in a dissent addressing a question not reached by the majority, that they viewed the *Younger* considerations as "equally applicable where state civil litigation is in progress" (*Id.* at 561). However, most recently in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), the Court, including the three dissenters in *Lynch*, specifically declined to make a "general pronouncement upon the applicability of *Younger* to all civil litigation" (*Id.* at 607). In *Huffman*, the federal court had been asked to enjoin a pending state civil nuisance proceeding which had been brought by the state. The Supreme Court emphasized the fact that the state had brought the state court action and that that action was "both in aid of and closely related to criminal statutes" (*Id.* at 604). Under these circumstances, the Court concluded that to disrupt the state action would interfere with the "State's efforts to protect the very interests which underlie its criminal law" (*Id.* at 605), and that the affront to the state was just as great as it would be if the state proceeding had been criminal. Thus the Court held that the principles of federalism and comity expressed in *Younger* applied and dictated that the federal court decline to exercise its jurisdiction.

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In the instant case, not only is there no state criminal proceeding involved, but the pending state civil action was brought by a private party on the basis of the state labor statutes, and can in no way be considered to be either "in aid of" or "closely related to" any criminal statute. Thus we conclude that the *Younger* principles, even as extended by *Huffman*, do not apply with such force in this case. *Vail* v. *Quinlan*, 406 F.Supp. 951 (S.D.N.Y.), *prob. juris. noted sub nom Juidice* v. *Vail*, — U.S. —, 96 S.Ct. 3164 (1976).

To determine whether the principles of comity and federalism should cause us to decline to assert jurisdiction here, we must evaluate the competing state and federal interests, in light of the ground asserted in support of intervention in the state proceedings. *Perez* v. *Ledesma*, 401 U.S. 82 (1971). Here, plaintiff asserts a claim of federal preemption. Recently, a three-judge court in *Doe* v. *Maher*, 414 F.Supp. 1368 (D. Conn. 1976), appeal docketed, 45 U.S.L.W. 3451 (December 24, 1976), analyzed the considerations of comity and federalism presented when a federal plaintiff asserts a preemption, rather than a constitutional, claim as the ground for federal intervention in state proceedings and concluded that "traditional notions of federal-state relations, rather than requiring abstention, impel this court to intervene" (*Id.* at 1374).

The *Maher* court indicated that, while the doctrines of comity and federalism counsel a federal court to give proper deference to the independent sovereignty of the individual states, this deference should be tempered by recognition of the particular areas of expertize of the federal and state courts. A claim of preemption requires the court to determine, in the absence of specific direction, the Congressional intent behind a particular statute. This is a task of federal

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statutory interpretation. Because the federal courts have primary competence in deciding questions of federal law, preemption thus presents an issue which is within the sphere of special federal judicial competence. It would be inappropriate for a federal court to decline jurisdiction in these circumstances.

The court in *Maher* also determined that the federalism interest of avoiding any interference with pending state court proceedings was not compelling where the federal injunction was based on preemption, rather than constitutional, grounds. In the case of preemption, the intrusion flowed from and expressed a Congressional determination that the area was not within state power. Thus, as the court stated:

> [a] finding of preemption . . . is a finding that the intrusion has already occurred . . . it would be a finding that for reasons of national policy Congress had intended that the pending state court actions should not have been instituted. It would be a finding concerning the validity of the proceeding itself, not just concerning the constitutionality of the particular statute or its particular application. While this would clearly be an intrusion into a legitimate sphere of state interest, it would be an intrusion accomplished at the direction of Congress, and one which is clearly within Congress' power to direct. 414 F.Supp. at 1375.

An additional factor militates against declining jurisdiction in the instant case: here the NLRB is asserting the claim of federal preemption. We think that the same considerations which caused the Supreme Court to develop an exception to § 2203 for the federal government and its

agencies in *Leiter* and *Nash-Finch,* and to conclude that for these federal entities, "access to federal courts is 'preferable in the context of healthy federal-state relations' " (404 U.S. at 147 citing *Leiter* at 226), support the exercise of federal jurisdiction here.

Thus we have concluded that the concerns addressed by the principles of comity and federalism weigh in favor of, not against, our exercising jurisdiction.

Nor does the CIR's assertion that plaintiff has an adequate remedy in the state courts change this balance. It would appear that the pending state proceedings offer adequate opportunity for the NLRB to raise fully its preemption claim. However, as discussed above, a finding that federal law preempts application of any state regulation amounts to a finding that the state action should not have been brought. The NLRB is not a party to the state actions and specifically declined to join them, though invited to by the CIR (Defendant CIR's Answer, Exhibits 23 and 24). Rather than finding this choice improper, we think it would be somewhat anomalous to require the NLRB to submit to the jurisdiction of a state court when the basis of its claim is that the state does not have any jurisdiction over the subject matter.

Further, we think that the preference for a federal forum expressed in *Nash-Finch* weighs strongly against our requiring the NLRB to seek its remedy in state court. Indeed, in *Nash-Finch,* the Court did not so require. As Justice White observed (dissenting):

> Rather than allowing the union to appeal the injunction through the state court system, and to this Court if necessary, as the union would ordinarily have to do, *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers, supra,* the Court today permits the Board to short-circuit that process by securing a federal injunction, solely upon allegations that the conduct of the union was arguably protected under federal law and was within the exclusive jurisdiction of the NLRB. 404 U.S. at 154-155.

We think here that it is neither necessary nor proper for us to require the NLRB to first litigate its preemption claim in the state courts, and we will not decline jurisdiction because of the CIR's claim that plaintiff has an adequate state court remedy.

Accordingly, we do not find that the considerations of federalism and comity or the adequacy of state remedies require that we decline to exercise our jurisdiction, and we will now consider the merits of the plaintiff's claim.

PREEMPTION

Preemption of state regulation occurs where there is a clear manifestation of Congressional intent to occupy the field and supersede the state's exercise of power. *New York Department of Social Services* v. *Dublino,* 413 U.S. 405 (1973); *Schwartz* v. *Texas,* 344 U.S. 199 (1952). Divining this intent from the provisions of the National Labor Relations Act has involved the courts in a considerable stream of litigation since the passage of the Act. In the course of this process of interpretation, the Supreme Court has identified a number of different factual patterns wherein federal pereemption is indicated. For the purposes of this case, we have found it useful to analyze these cases by dividing them into three categories.

The first consists of cases where the Board has determined that the activity involved is protected by § 7 (Rights

of Employees), or prohibited by § 8 (Unfair Labor Practices), of the Act, or where, even though the Board has not determined the status of the conduct, it may fairly be assumed to be, or is arguably, subject to §§ 7 or 8. Here the Court has consistently found preemption necessary to policy as expressed by the provisions of §§ 7 and 8. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-245 (1959); *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971); *Garner* v. *Teamsters, Chauffers and Helpers Local Union No. 776*, 346 U.S. 485 (1953); *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18 (1949).

The Act has also been interpreted to preempt state regulation in areas where the Board has declined to exercise its jurisdiction on the ground that it would not effectuate the policies of the Act to do so. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947).

The third category of cases in which the Court has found federal preemption of state regulation is where the activity is neither protected nor prohibited by the Act, and the national labor policy has been interpreted to require that the activity should be wholly unregulated and left to the free play of economic forces. *Local 20, Teamsters, Chauffers & Helpers Union* v. *Morton*, 377 U.S. 252 (1964); *Lodge 76, International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, — U.S. —, 96 S.Ct. 2548 (1976). *See, NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971). A variation within this third line of cases, presenting a limited aspect of preemption, are a number of cases in which the Court found the National labor policy to dictate that the labor relations of particular entities not be subject to the provisions of the

NLRA, or any comparable state labor statutes, but not to preclude application of all state laws. *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Association*, 382 U.S. 181 (1965); *cf. Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653 (1974).

I

We first turn to the legislative history of the 1974 health care amendments (P.L. 93-360, 88 Stat. 395) to see if it indicates that Congress contemplated the preemption of state regulation of labor relations covered by these amendments. We conclude that such was the intent of Congress. *Accord, Methodist Hospital of Brooklyn* v. *New York State Labor Relations Board*, 382 F.Supp. 459 (S.D.N.Y. 1974); *State of New York* v. *Local 144, Hotel, Nursing Home and Allied Health Services Union*, 92 LRRM 2357 (S.D.N.Y. 1976); *North Shore University Hospital* v. *Levine*, 90 LRRM 2529 (E.D.N.Y. 1975).

This intention emerges distinctly from the remarks made in both the House and Senate during discussions of the 1974 amendments and from the fact that a proposal that the bill be amended specifically to insure the continuing vitality of state labor laws and prevent their preemption was rejected by both houses. 120 Cong. Rec. 12946, 12995 (May 2, 1974); 16899-900, 16904-906, 16908-911 (May 30, 1974); 22575-576, 22581-582 (July 10, 1974); 22942-943 (July 11, 1974). The remarks recommending that the NLRB favorably entertain the possibility of ceding jurisdiction back to the states under § 10(a)[4] of the Act, do not suggest a con-

[4] Section 10(a) provides in pertinent part: "That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry . . . even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

trary Congressional understanding as to the preemptive impact of the 1974 amendments. 120 Cong. Rec. 22576, 22581-582 (July 10, 1974); 22942-943 (July 11, 1974). Indeed, such remarks were premised on the recognition that state regulation would be preempted and thus that § 10(a) ceding would be the only way that a state could continue to exercise jurisdiction.

Thus we find that Congress intended, by the 1974 amendments, to preempt from state regulation the labor relations of employees of private, voluntary, non-profit hospital employers such as those against whom the CIR filed representation petitions and unfair labor practice charges with the SLRB. Accordingly, if housestaff were employees of such hospitals, all labor disputes between these entities would be within the exclusive jurisdiction of the NLRB. However, the instant action does not present us with this easy case and thus this general expression of Congressional intent is not dispositive.

Here, the Board has ruled that housestaff are not "employees" as defined in the Act, but "primarily students."[5] *Cedars-Sinai Medical Center,* 223 NLRB No. 57 at 3, 8 (1976). It is properly within the power and duties of the Board, as the agency entrusted with the primary responsibility of administering and interpreting the Act, to make this initial determinaton as to the "employee" status of housestaff. *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U.S. 485 (1947); *Bethlehem Steel, supra.* Indeed, this determination, and a finding that the employer is engaged in activity affecting interstate commerce, are threshold jurisdictional questions which the Board must always resolve before it may entertain any

[5] By so holding the Board rejected the contention that housestaff are "professional employees" as defined in Section 2(12) of the Act.

labor dispute presented to it. As a consequence of its finding in *Cedars-Sinai* that housestaff are not "employees," the Board was required to dismiss the union's representation petition because "no question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act" (*Id.* at 3, 8).

The role of this Court is not to review this original determination by the Board, and we therefore express no opinion as to its soundness. The controvery in this case concerns the issue of whether or not defendant CIR may request the SLRB to assert jurisdiction over the representation petition, and unfair labor practice charges which the CIR filed against the hospitals. The question before us, then, is whether, given the Board's ruling that housestaff are not "employees" within the NLRA, the Board's further ruling in *Kansas City* that the labor relations of housestaff are preempted by the 1974 health care amendments from all state regulation is correct.

Since the Board has found that housestaff are not "employees" within the Act, it follows from the interlocking definition set forth in § 2(5),[6] that their union is not a "labor organization" under the Act as the Board so held in *Cedars-Sinai.* Section 7 delineates certain rights and protections which the Act affords to "employees." Section 8 prohibits an employer from engaging in certain kinds of activity with regard to "employees" or a "labor organization" and provides parallel prohibitions against certain

[6] Section 2(5) states that: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

activity by a "labor organization." Section 9 regulates the procedures whereby "employees" designate or elect their representative for purposes of collective bargaining. Therefore, by their terms, §§ 7, 8 and 9 cannot apply to protect or prohibit any actions at all taken by housestaff or their union, or any actions taken by an employer with regard to housestaff or their union. *Cf. Beasley* and *Hanna Mining, supra.*

Accordingly, we conclude that the general Congressional intent to preempt state regulation of labor relations covered by the 1974 health care amendments cannot encompass the labor relations of housestaff and that the preemption doctrine articulated in *Garmon* and *Lockridge, supra,* does not apply.

II

The second theory of preemption discussed earlier was delineated in *Bethlehem Steel, supra,* where the Board had ruled that foremen were "employees" within the definition of the Act and their employer was engaged in interstate commerce; thus the Board had jurisdiction over the representation petition filed by the foremen's union. However, the Board declined to exercise its jurisdiction on the ground that it would not effectuate the policies of the Act to do so. Under these circumstances, the Supreme Court found that for the state to apply its labor laws, and recognize a bargaining unit of foremen, would conflict with the federal labor policy that such units were inappropriate, and thus the Court held state regulation preempted. Plaintiff and *amici* urge this court to apply the rationale of *Bethlehem Steel* here.

The problem we find with doing so in this case is that one of the elements vital to *Bethlehem Steel* is missing. *Bethlehem Steel* was premised on the fact that the Board

had jurisdiction over the foremen's petition. As the Court stated:

> The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra,* its power to decide whether these foremen may constitute themselves a bargaining unit. 330 U.S. at 776.

The clear import of this passage is that without the Board's ruling that foremen were "employees" within § 2(3)—a ruling upheld by the Supreme Court in *Packard, supra*—the Board could not "rightfully" assert power over the union's petition. This conclusion flows directly from the language of the NLRA which, except for the specific provision in § 14(a) concerning "supervisors"[7] nowhere applies to the labor relations of *non-employees,* whether or not they happen to provide their services for entities that are "employers" under the Act.[8] The scope of the Board's

[7] Section 2(3) states that the "term 'employee' . . . shall not include . . . any individual employer as a supervisor." However, Section 14(a) provides that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

[8] The Board in its original decision in *Kansas City General Hospital,* 225 NLRB No. 14 (1976), followed the logical consequence of its *Cedars-Sinai* ruling even one step further and found that the hospital was "not an 'employer' within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to [housestaff]."

power to interpret and administer the Act must necessarily be limited by the boundaries of the Act itself. Therefore, once the Board determined that housestaff are not "employees," it had no power to exercise over them and had no jurisdiction over them which it would decline to assert. Accordingly, we conclude that *Bethlehem Steel* does not control here.

III

Thus it is the preemption principle enunciated in the third group of cases noted earlier that could most properly apply here, where housestaff and their labor relations activities are, because of the Board's ruling, neither protected nor prohibited by the Act. The crucial question, then, is whether national labor policy requires that housestaff labor relations be free from all regulation, state as well as federal, and left to the unrestrained interplay of economic forces in the marketplace. *Teamsters* v. *Morton, Machinists* v. *WERC, supra.*

We first consider whether there is anything in the legislative history of P.L. 93-360 which indicates that Congress specifically intended that housestaff should not be regulated by either the NLRA or any state labor laws.

The general purpose behind the enactment of the health care amendments to the NLRA was to "insure the continuity of health care to the community and the care and well being of patients" (Senate Report No. 93-766 at 4, 93d Cong. 2d Sess. (1974)). To this end, the previous exemption of non-profit health care institutions was deleted from § 2(2), on the ground that "the exemption of non-profit hospitals from the Act had resulted in numerous instances of recognition strikes and picketing" (*Id.* at 3). It was felt that "[c]overage under the Act should completely eliminate the need for any such activities, since the procedures of the Act will be available to resolve organizational and recognition disputes" (*Id.*). These special procedures under the Act include requirements that the union give 10-day notice before striking (new § 8(g)), and that the union and employer participate in mediation at the direction of the Federal Mediation and Conciliation Service (amended § 8(d)). Thus the general national labor policy expressed by Congress in enacting P.L. 93-360 was that the labor relations of non-profit health care institutions should no longer be left to "the free play of economic forces" (*Nash-Finch*, 404 U.S. at 144), but should be subject to regulation uniform federal regulation, in particular.

The only specific position which Congress took on the question of whether or not housestaff would be included in this plan of national labor regulation, was in response to the suggestion that they might be considered "supervisors," and thus be excluded from the Act. On this issue, Congress indicated that housestaff would *not* come within the definition of "supervisor" in § 2(11). Consequently, a special provision to insure that housestaff would not be excluded from the Act was unnecessary. The Senate Report stated:

> [v]arious organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor." The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other

> employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
>
> The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations. S. Report No. 93-766 at 6.

This resolution of the one possible exclusion problem that arose suggests that Congress, at the time it was considering the health care amendments, did not have any policy that housestaff should not be covered by the Act or any other body of labor law. This interpretation of Congressional intent is further supported by the language used in this passage which indicates that Congress may well have thought that housestaff would be classified as "professional employees," as defined in § 2(12) of the Act.

Thus, what evidence there is of Congressional intent as to regulation of housestaff under the NLRA points toward their inclusion in the general national labor policy of regulating labor relations in health care institutions. We certainly have found no clear expression in the legislative history of P.L. 93-360 of a contrary national labor policy that housestaff should be unregulated by both the NLRA and any state labor laws.

We next consider the NLRB's ruling on preemption. It appears that the Board's decision, *sua sponte,* to reconsider its order in *Kansas City* and address the preemption question was somewhat precipitate. As Chairman Murphy and Member Penello noted in the revised order:

> [t]he preemption issue was never raised or litigated by the parties nor was it considered or even contemplated by us in reaching our decision [originally]. Now that the New York Supreme Court has attempted to broaden the original Decision and Order to encompass the preemption issue, we have decided to join our colleagues in deleting the quoted language [that the hospital was "not an 'employer' within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to (housestaff)] in this Revised Decision and Order to avoid even the slightest impression that a majority of this Board believes that state jurisdiction over residents, interns, and fellows has not been preempted by the Federal statute.
>
> In addition, however, Chairman Murphy notes that it was not her intent at the time this case was decided that the Board was preempting the field insofar as Federal labor policy might apply to interns and residents, but she has now been persuaded that this was the effect of the 4 to 1 majority holding herein. 225 NLRB No. 14A at 4, fn. 6.

The rationale for its finding of preemption was expressed by the Board (Member Fanning dissenting) as follows:

> It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, *inter alia,* were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in *Cedars-Sinai,* by finding residents, interns, and fel-

> lows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy. 225 NLRB No. 14A at 4-5.

While this explanation does not amplify the Board's ruling on preemption as much as we might have liked, we think it clear enough that the Board reached its decision on the basis of its conclusion that it is the national labor policy that persons who are "primarily students" should not be afforded collective bargaining rights under the Act and should be unregulated by all labor laws, state and federal.

The Board, in the course of ruling on representation petitions by unions seeking to represent employees at educational institutions, has considered, in a number of cases, the propriety of including students working for the institutions in the petitioned-for bargaining units. *Leland Stanford Junior University*, 214 NLRB No. 82 (1974); *Barnard College*, 204 NLRB No. 155 (1973); *Cornell University*, 202 NLRB No. 41 (1973); *Georgetown University*, 200 NLRB No. 14 (1972); *College of Pharmaceutical Sciences in the City of New York*, 197 NLRB No. 142 (1972); *Adelphi University*, 195 NLRB No. 107 (1972).

In *Leland Stanford*, the Board ruled, as it did in *Cedars-Sinai*, that the graduate research assistants whose union sought certification of a collective bargaining unit were not "employees" within the meaning of § 2(2), and dismissed the union's petition. However, in all the other cases, the Board did not rule that students *per se* were not "employees" under the Act, but simply found that the students

—referred to by the Board as "student employees," or "primarily students" or "not primarily employees"[9]—did not have a sufficient community of interest with the other, regular employees so as to make inclusion of the student workers in the petitioned-for units appropriate.

In the majority of these cases, the Board seems to have acted on the principle that student workers are covered by the Act, and to have simply determined that they should not be part of the particular unit that was petitioned-for, and *not* that they should or could never be part of any collective bargaining unit. Indeed the Board in *Cedars-Sinai* appeared to have explicitly recognized and accepted this principle, stating:

> [w]e are aware that the Board has included students in bargaining units and, in a few instances, has authorized elections in units composed exclusively of students . . . we do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act. 223 NLRB No. 57 at 9.

Accordingly, we do not discern in these cases the expression of a uniform national labor policy that workers who are also students or "primarily students" should be denied collective bargaining rights.

We also have not been directed to, nor have we found, any expression of a national labor policy that students be wholly unregulated in either the Act itself or its legislative history. Nor have plaintiff or *amici* been able to articulate the rationale which would support such a national policy vis-à-vis students. The impact which collective bargaining might have on the "student-teacher relationship" and the educational experience, which *amicus* Association of Amer-

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[9] In *Cedars-Sinai*, the Board found that housestaff, "although they possess certain employee characteristics, are primarily students." 223 NLRB No. 57 at 3.

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ican Medical Colleges urges in support of the Board's ruling on preemption (AAMC Brief at 9-12), may be a legitimate concern of education policymakers, but this is surely beyond the scope of any national *labor* policy. Further, the student-teacher relationship is not analogous to the supervisor-employer relationship, and thus we do not find the policies which led to the statutory exclusion of "supervisors" from the Act—that their inclusion would improperly taint the collective bargaining process both for other employees and the employer, and would upset the balance of power—applicable here. For a fuller discussion of these policies see *Beasley*, 416 U.S. at 659-662; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *Packard*, 300 U.S. at 496-500 (Douglas, J. dissenting).

Thus, although we are mindful of the deference we owe to the Board's formulations as the agency entrusted with the primary function of interpreting and administering the NLRA, we cannot agree that there is a uniform national labor policy that persons who are "primarily students" should not only be denied collective bargaining rights under the Act, but be left unregulated by any labor law, state as well as federal.

Accordingly, because we have not been able to find any national labor policy that requires that the labor relations of housestaff be totally unregulated and left to the free play of economic forces, we find that the preemption doctrine enunciated in *Teamsters* v. *Morton*, *Machinists* v. *WERC* or *Hanna Mining*, all *supra*, does not apply in the instant case.

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IV

Finally, we recognize that the provisions of the New York SLRA pertaining to hospital workers are not identical to the provisions of the NLRA health care amendments. Sections 713 and 716 of the Labor Law (McKinney's 1965) prohibit strikes and lockouts and require binding arbitration of any grievance or dispute in non-profitmaking hospitals. These requirements are more restrictive than the strike and arbitration provisions set forth in the NLRA § 8(d) and (g) (see discussion *supra* at 26). However, Congress has expressed particular concern over the disruptive effect on patient care of strikes in health care institutions, and has evidenced a basic intent that the labor relations of these institutions be regulated in order to prevent such disruption. The occurence, last fall, of recognitional strikes by the CIR in response to the hospitals' refusals to bargain with the CIR because of the Board's ruling in *Cedars-Sinai* and the hospitals' contention that state regulation had been preempted (Gluckman Affidavit of November 30, 1976 at 2-6), is exactly the evil sought to be removed by the enactment of the 1974 amendments. Thus we think that allowing the possibility of state regulation of housestaff is more in harmony with, and in furtherance of, the national labor policy and Congressional intent relating to health care institutions, than is foreclosing any state regulation of housestaff labor relations.

To summarize, our jurisdiction has been properly invoked under 28 U.S.C. § 1337 and we may exercise this jurisdiction under the *Nash-Finch* exception to the prohibition of 18 U.S.C. § 2283. Because the NLRB's ruling that housestaff are not "employees" under the NLRA, the labor

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relations of housestaff physicians are not subject to the provisions of the Act and are not within the jurisdiction of the Board. We conclude that the NLRA does not preempt the exercise of state power over the labor relations of housestaff because we find that there is no national labor policy which requires that housestaff be unregulated by all bodies of labor law and controlled only by the free play of economic forces. Accordingly, we deny plaintiff's motion for a preliminary injunction and we grant defendant CIR's motion for summary judgment. This memorandum decision shall constitute the Court's findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

So Ordered.

/s/ Charles Stewart
United States District Judge

Dated: New York, N. Y.
January 31, 1977.

Order

UNITED STATES DISTRICT COURT
Southern District of New York
76 Civ. 5119

National Labor Relations Board,
Plaintiff,

against

Committee of Interns and Residents and The New York State Labor Relations Board,
Defendants.

This action came on for hearing before this Court on December 16, 1976, and, after due deliberation, a memorandum decision and order of this Court having been rendered on January 31, 1977 and filed February 2, 1977,

It is ordered and adjudged

that the motion of plaintiff National Labor Relations Board for a preliminary injunction be denied, and that the motion of defendant Committee of Interns and Residents for summary judgment dismissing the complaint as to all defendants on the ground that it fails to state a cause of action be granted for the reasons stated in this Court's memorandum decision of January 31, 1977.

Charles E. Stewart, Jr.
United States District Judge

Dated: New York, N. Y.
March 7, 1977.

Raymond F. Burghardt
Clerk

Appendix II

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1447 September Term, 1976

(Argued July 20, 1977 Decided September 1, 1977)

Docket No. 77-6075

NATIONAL LABOR RELATIONS BOARD,
Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS and NEW YORK STATE LABOR RELATIONS BOARD,
Defendants-Appellees.

Before:

MESKILL, *Circuit Judge* and NEAHER * and COFFRIN,** *District Judges.*

In this action, the National Labor Relations Board sought an injunction in the United States District Court for the Southern District of New York against the holding of a representation election under the auspices of the New York State Labor Relations Board. The NLRB moved for a preliminary injunction, and the defendant cross-moved for summary judgment. The district court, Charles E. Stewart, Jr., *J.*, granted the defendant's motion and the plaintiff appealed.

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* Hon. Edward R. Neaher of the Eastern District of New York, sitting by designation.

** Hon. Albert W. Coffrin of the District of Vermont, sitting by designation.

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Reversed and remanded.

CARL L. TAYLOR, Associate General Counsel, National Labor Relations Board, Washington, D. C. (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Elliott Moore, Deputy Associate General Counsel, William Wachter, Assistant General Counsel for Special Litigation, Ruth E. Peters, Attorney, National Labor Relations Board, Washington, D. C., of counsel), *for Plaintiff-Appellant.*

MURRAY A. GORDON, New York, New York, *for Defendant-Appellee Committee of Interns and Residents.*

NORBERT M. PHILLIPPS, General Counsel, New York State Labor Relations Board, New York, New York, *for Defendant-Appellee New York State Labor Relations Board.*

MESKILL, *Circuit Judge:*

Prior to 1974, workers in voluntary, non-profit hospitals were excluded from coverage under federal labor law. In that year, Congress amended the National Labor Relations Act ("NLRA"), to include the labor-management relations of all non-profit health care institutions. Pub. L. No. 93-360, 88 Stat. 395 (1974) (amending 29 U.S.C. §§ 151 *et seq.* (1970)) ("the Health Care Amendments"). This case requires us to consider the preemptive effect of that change.

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The Committee of Interns and Residents ("CIR") is a union of housestaff personnel. Its membership consists of doctors receiving post-graduate training in various hospitals. The three categories of its membership are interns, who have just completed medical school and are generally involved in a one-year program; residents, who are in a longer training program leading to certification in a medical specialty; and clinical fellows, who have completed residencies and are being trained in medical sub-specialties. From 1957 to 1974, CIR represented the housestaff at a number of hospitals in New York City under the jurisdiction of the New York State Labor Relations Board ("SLRB").

After the passage of the Health Care Amendments in 1974, a number of housestaff organizations similar to CIR filed election petitions with the NLRB. In March, 1976, the NLRB issued its first decision on these petitions, *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251 (1976). That case held that while housestaff "possess[ed] certain employee characteristics," they are "primarily engaged in graduate educational training, and thus were students rather than employees. On this basis, the NLRB concluded that housestaff should not be given collective bargaining rights, and dismissed the petition.

Several weeks later, CIR filed an election petition with the SLRB. In July, 1976, the SLRB dismissed the petition on the ground that federal labor law, as expressed in *Cedars-Sinai*, had preempted the field. *In re Misericordia Hospital Medical Center*, 39 S.L.R.B. No. 32 (1976).

The CIR then brought suit in New York State Supreme Court to compel the SLRB to accept jurisdiction. That court ruled that the SLRB was free to accept jurisdiction over the labor relations of housestaff. *Committee of Interns and Residents* v. *New York State Labor Relations Board*, 88 Misc. 2d 502, 338 N.Y.S.2d 509 (Sup. Ct. N.Y. County 1976). The following month, the NLRB issued an

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opinion concerning a housestaff union in which it explained that its intention in *Cedars-Sinai* had been to preempt the field. *Kansas City General Hospital*, 225 N.L.R.B. No. 14A, 93 LRRM 1362 (1976) ("Kansas City II"). In light of that decision, the state court vacated its prior decision. *Committee of Interns and Residents* v. *New York State Labor Relations Board*, 391 N.Y.S.2d 503, 505 (Sup. Ct. N.Y. County 1977).

In the interval between the two state court decisions, the NLRB began the action involved in the instant appeal. It sought to enjoin the holding of elections for housestaff officers under the aegis of the SLRB. *See NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971). The Board moved for a preliminary injunction, and the CIR cross-moved for summary judgment. Judge Stewart granted the CIR's motion, and denied any relief to the NLRB. 426 F.Supp. 438 (S.D.N.Y. 1977). We reverse and remand.

I

Federal preemption in the labor field is particularly broad. *See Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972). As the Supreme Court stated in *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953):

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered

> that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.

Id. at 490. The few exceptions to this pervasive federal regulation fall into a small number of categories. Congress has explicitly given the states jurisdiction over some labor matters, such as damage suits for unfair labor practices. 29 U.S.C. § 187(b). Suits for state-law torts committed during a labor dispute are traditionally matters of state concern, with only a peripheral federal interest. *Farmer* v. *United Brotherhood of Carpenters,* 45 U.S.L.W. 4263 (U.S. March 7, 1977). Finally, Congress has established clear procedures by which the NLRB may cede jurisdiction over labor disputes to appropriate state authorities. 29 U.S.C. §§ 160(a), 164(c). As discussed below, this case does not fall within any of these exceptions.[1]

II

In *Cedars-Sinai,* the NLRB concluded that housestaff, "although they possess certain employee characteristics, are primarily students." 223 N.L.R.B. at 251. Accordingly, the Board concluded that collective bargaining was not mandated by the NLRA or the Health Care Amendments, and that the extension of such rights to a student-teacher relationship was contrary to national labor policy.

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[1] At the time the NLRA was passed, it was thought that some labor disputes were beyond the scope of the commerce power. See 79 Cong. Rec. 9721 (1935) (exclusion of agricultural workers from definition of "employee" in NLRA). There is no contention here that Congress is without power to regulate the labor relations of interns and housestaff.

The district judge seized upon this distinction as the premise of a faulty syllogism. He concluded that, if housestaff were not "employees" as defined in § 2(3) of the NLRA, 29 U.S.C. § 152(3), then the CIR was not a "labor organization" as defined in § 2(5), 29 U.S.C. § 152(5). Since the NLRA applies only to "labor organizations," he concluded that the Board had waived its jurisdiction over housestaff. 426 F.Supp. at 449.[2]

The judgment of the district court is in conflict with the expressed intent both of Congress and the NLRB. In *Cedars-Sinai,* the NLRB stated that "it will effectuate the policies of the Act to assert jurisdiction." 223 N.L.R.B. at 251. Moreover, §§ 10(a) and 14(c) of the NLRA contain explicit mechanisms by which the NLRB can cede jurisdiction to state labor authorities. 29 U.S.C. §§ 160(a), 164(c).[3] Had the NLRB intended to cede jurisdiction to the SLRB, it would have been simple to do so. There is no reason to assume the NLRB did implicitly what it could have done expressly.

The NLRB made this clear in a subsequent decision. In *Kansas City II, supra,* the Board adhered to its decision that housestaff are not "employees," but held that the

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[2] We have recently criticized a similarly literal approach to the definitions contained in the NLRA. *Marriott In-Flite Servs.* v. *Local 504, Transport Workers of America,* 557 F.2d 295 (2d Cir. 1977).

Even under the district court's analysis, the injunction should have issued. In *Kansas City II,* it is apparent that the NLRB concluded only that housestaff were not "primarily" employees, and not that they lacked all employee characteristics.

[3] These provisions are the exclusive means for ceding federal jurisdiction over activities covered by the NLRA. *Cf. Guss* v. *Utah Labor Board,* 353 U.S. 1 (1957).

hospital is nevertheless their "employer." The Board then stated:

> Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, inter alia, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in Cedars-Sinai, by finding residents, interns, and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy.

93 L.R.R.M. at 1364 (footnote omitted).

Thus, it is clear from *Cedars-Sinai* and *Kansas City II* that the NLRB has not ceded jurisdiction over housestaff. Rather, the NLRB concluded that, although it has jurisdiction, it would be contrary to national policy to extend collective bargaining rights to housestaff because they "are primarily students."

There can be no doubt that the NLRB has power to prevent the states from granting collective bargaining rights to housestaff unions. In *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767 (1947), the Supreme Court was faced with a closely analogous situation. At the time, the NLRB had concluded that supervisors were "employees" within the meaning of theAct. *Maryland Dry Dock Co.,* 49 N.L.R.B. 733 (1943). However, it had also concluded that, as a matter of national labor policy, unions of supervisors should not be given collective bargaining rights under the Act. The supervisors union filed election petitions with the SLRB, which accepted jurisdiction.

The Supreme Court reversed on preemption grounds. For the Court, Mr. Justice Jackson wrote:

> There was no administrative concession that the nature of these appellants' business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. . . . It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. . . . We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.
>
> Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involes the same employers and the same employees. Each has

> delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. . . . But the power to decide a matter can hardly be made dependent on the way it is decided.

330 U.S. at 775 (citations omitted). *Bethlehem Steel* controls here. The NLRB has asserted its jurisdiction and denied collective bargaining rights. Under *Bethlehem Steel*, State power has been ousted by agency action taken pursuant to a Congressional mandate.

III

The district judge attempted to distinguish *Bethlehem Steel* by focusing on the decision that housestaff are not employees.[4] In doing so, he misconceived the issue.

The inquiry is not a narrow or technical one, but rather whether Congress intended to occupy the field. The court must focus on the activity regulated and determine if it

[4] Under the district court's analysis, SLRB jurisdiction would be outsted only if the NLRB found that (1) housestaff were employees and (2) that they should be denied collective bargaining rights because of their "primarily" student character. It is doubtful that an important aspect of national labor policy could turn upon such a highly technical distinction.

has been brought within the scope of federal power. Thus, in *Bethlehem Steel, supra,* the Court held:

> The federal board has jurisdiction ... the *industry* in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in [*Packard Motor Car Co.* v. *NLRB,* 330 U.S. 485 (1947),] its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted.

330 U.S. at 776 (emphasis added). The case at bar presents an identical situation. The federal regulation of labor law is so sweeping that it is inconceivable that the power of the states to act turns upon the way in which the agency decided a policy question. *Bethlehem Steel* explained that:

> [W]hen federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. . . . However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject . . . or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal

> administrative regulation. . . . The states are in those case permitted to use their police power in the interval. . . . However, *the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.*

330 U.S. at 774 (emphasis added; citations omitted).

As the district court found, the unequivocal intent of Congress was to include all the labor relations of voluntary hospitals within the NLRA. 426 F.Supp. at 448.[5] Both the Senate and the House rejected amendments meant to ensure continued state jurisdiction in hospital matters. 120 Cong. Rec. 12946, 12995 (May 2, 1974); 16899-900, 16904-06, 16908-11 (May 30, 1974); 22575-76, 22581-82 (July 10, 1974); 22942-43 (July 11, 1974). This is in keeping with the ordinary rule of federal preemption in labor matters. Thus, Senators Mondale and Taft spoke in favor of the Health Care Amendments as a "national approach" to labor rela-

[5] Even with the narrow issue focussed on by the district court—exclusion from the definition of "employee"—the underlying Congressional intent can lead to opposite results for preemption purposes. Thus, the exclusion of agricultural workers in § 2(3), 29 U.S.C. § 152(3), is the result of a Congressional decision not to exercise federal power over farm labor. *See* 79 Cong. Rec. 9721 (1935); 93 Cong. Rec. 6599 (1947). Therefore, the states may assert jurisdiction over the labor relations of farms and their employees. *See United Farm Workers Organizing Comm.* v. *Superior Court*, 4 Cal. 3d 556, 483 P.2d 1215, 94 Cal. Rptr. 2d 263 (1971) (In banc). However, the exclusion of supervisors in the same Section is the result of a Congressional determination that national labor policy requires that supervisors not be guaranteed collective bargaining rights. Accordingly, the Supreme Court has held that state jurisdiction over supervisors unions has been ousted by § 2(3). *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653 (1974).

tions in hospitals. 120 Cong. Rec. 12944-46 (May 2, 1974). Senator Williams, the chief sponsor of the Health Care Amendments in the Senate, stated:

> [T]he general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation.

120 Cong. Rec. 22575 (July 10, 1974). Similarly, the House sponsor, Representative Thompson, expressed the view that "it is apparent that the Federal law preempts any State law." 120 Cong. Rec. 22942 (July 10, 1974). Furthermore, the House rejected the "Quie Amendment," which would have ceded substantially less jurisdiction to the states than the CIR now claims for the SLRB. Finally, it is clear that Congress intended to include housestaff within the coverage of the Health Care Amendments. For example, in explaining Congress' rejection of amendments to the definition of "supervisor" in § 2(11), 29 U.S.C. § 152(11), the Senate Report stated:

> The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions.

S. Rep. No. 93-766, 1974 U. S. Code Cong. & Admin. News 3951. Thus, Congress rejected the amendment because it considered housestaff within the scope of the Health Care Amendments.

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It is clear that Congress, if it wished, could exclude housestaff from the definition of "employee"; it could also deny them collective bargaining rights under state law. *Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653 (1974). Here, however, that decision has been made by the expert administrative agency to which Congress has delegated wide powers over national labor policy. It is thus clear that Congress has completely ousted state jurisdiction.

IV

A contrary holding would have a number of damaging effects. Primary among them would be the introduction of disparity in a labor policy designed to be national in scope. As the Supreme Court stated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959):

> We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.
>
> * * *
>
> Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the

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> activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting.

Id. at 242-43. If the NLRB erred in its treatment of housestaff unions, the solution is clearly not to create a patchwork of state-governed labor unions.[6]

There are already several areas of conflict and potential conflict between state and federal regulation. For example, the New York Labor Law provides for compulsory arbitration in labor disputes in voluntary hospitals. N.Y. Lab. Law §§ 716(2), (3), (4) (McKinney 1977), and the state courts may enjoin hospital strikes, *id.* § 716(9); on the other hand, the NLRA allows strikes and free collective bargaining, and hospital strikes come within the general prohibition of the Norris-LaGuardia Act. Thus, hospitals would be faced with contradictory duties and obligations if the CIR were to prevail. Similarly, the Health Care Amendments provide an elaborate mechanism for notice to be given by unions with grievances, 29 U.S.C. §§ 158(d), (g), while state law contains no such provisions.[7] Finally, a serious possibility

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[6] The CIR's argument, if accepted, would also create the possibility that housestaff in some states could not organize at all, while the CIR would be fully protected by New York law.

[7] While this legislative scheme might be better served if housestaff were organized, that is a policy question for the NLRB or Congress, and it has no relevance to the issue of preemption.

of conflict is raised if a jurisdictional dispute should arise between the CIR and a union recognized under the NLRA.[8]

The CIR has vigorously attacked the policy underlying *Cedars-Sinai.* However, the wisdom of the NLRB decision is not before us; it is before the United States District Court for the District of Columbia, where the CIR has brought a lawsuit seeking to overturn *Cedars-Sinai* as an abuse of discretion by the NLRB. *Physicians National House Staff Association* v. *Murphy,* Civ. No. 77-0358 (D.D.C., filed Mar. 3, 1977). In that action, the CIR contends that its members are "employees," and asks for an injunction to compel the NLRB to assume jurisdiction and extend collective bargaining rights. If the NLRB abused its discretion in *Cedars-Sinai,* those proceedings will correct the error. If the Board's action is upheld, however, the CIR may not seek to circumvent it by proceeding before the SLRB. The Health Care Amendments brought housestaff within national labor policy. Accordingly, the district court's conclusion that the SLRB had jurisdiction over housestaff was erroneous and cannot stand. In view of the State Supreme Court's decision in *Committee of Interns and Residents* v. *New York State Labor Board,* 391 N.Y.S.2d 503 (Sup. Ct. N.Y. County 1977), acquiescing in the NLRB's finding of preemption in *Kansas City II, supra,* there is doubt regarding whether this controversy has become moot or whether an injunction barring the holding of an election under the aegis of the SLRB is

[8] This Court recently noted, in the context of a voluntary hospital, that "New York policy is fundamentally at odds with the National Labor Relations Act." *NLRB* v. *St. Luke's Hosp. Center,* 551 F.2d 476, 483 (2d Cir. 1976). The dispute there was over the related issue of a union's right, under a union security agreement, to represent a distinct class of professional employees who did not wish to be represented by a union of professional and technical workers. We held there that the agreement, valid under New York law, violated the NLRA.

necessary or appropriate. These matters have been neither briefed nor argued. We therefore leave them for consideration by the district court on remand.[9]

The grant of summary judgment is reversed. The cause is remanded to the district court for further proceedings not inconsistent with this opinion. Each party shall bear its own costs on appeal.

[9] Justice Gellinoff dismissed the CIR's petition on January 6, 1977, and on January 20 he adhered to that ruling. On January 28, 1977, the NLRB prepared a motion for a stay of further proceedings in the instant action pending a final appellate determination of the state action. The NLRB argued that "[u]nless [the CIR's expected] appeal is successful, this Court will not need to rule on the Board's pleadings herein, since they are directed at a judgment which is now vacated." Unfortunately, this motion was not filed until February 3, 1977, the day after the district court filed its decision. Two days after the district court filed its decision, on February 4, the SLRB reversed its earlier decision, disregarded the decision of the State Court, and announced that, in view of the federal district court's decision, it would resume proceedings. Thus, if our view of the record is accurate, the district court's resolution of the merits on February 2 may have breathed new life into a controversy that was on the brink of mootness only weeks earlier. Such cases are inappropriate for resolution by the federal courts. *See DeFunis* v. *Odegaard,* 416 U.S. 312, 317 (1974) (student about to graduate). Indeed, this case appears to be a good example of a phenomenon of which federal district courts must be wary, namely, the generation, or re-generation, of what appears to be a constitutional "case" or "controversy" by means of the litigation process itself. *Cf. City of Hartford* v. *Glastonbury,* slip op. 5281, 5289-90 n.3 (2d Cir. Aug. 15, 1977) (en banc; plurality opinion); *id.* at 5293 (Kaufman, C.J., concurring). The NLRB's motion for a stay was ultimately denied on March 7, 1977, for the obvious reason that it had come too late.

Appendix II

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of November, one thousand nine hundred and seventy-seven.

HON. THOMAS J. MESKILL, *Circuit Judge,*
HON. EDWARD R. NEAHER, *District Judge,**
HON. ALBERT W. COFFRIN, *District Judge,***

77-6075

—o—

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS, and
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

—o—

On September 21, 1977, this Court issued a decision reversing the district court and remanding for a determination whether an injunction is still necessary to prevent the New York State Labor Relations Board from asserting jurisdiction over the labor relations of interns, residents and clinical fellows. This Court now having been advised by the New York State Labor Relations Board that it will

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not relinquish jurisdiction over the labor relations of interns, residents and clinical fellows without the entry of an injunction, and all parties to this case having jointly moved that this Court enter the following permanent injunction rather than remanding to the district court,

IT IS HEREBY ORDERED:

1. That the New York State Labor Relations Board is hereby permanently enjoined from asserting jurisdiction over the labor relations of interns, residents and/or clinical fellows; and

2. That the Committee of Interns and Residents is hereby permanently enjoined from attempting to cause the New York State Labor Relations Board to assert jurisdiction over the labor relations of interns, residents and/or clinical fellows.

THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

EDWARD R. NEAHER
Edward R. Neaher, U.S.D.J.

ALBERT W. COFFRIN
Albert W. Coffrin, U.S.D.J.

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* Of the Eastern District of New York, sitting by designation.

** Of the District of Vermont, sitting by designation.

Appendix III

PUBLIC LAW 93-360

93rd Congress, 2d Sess.,

July 26, 1974

AN ACT

To amend the National Labor Relations Act to extend its coverage and protection to employees of non-profit hospitals, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that (a) section 2(2) of the National Labor Relations Act is amended by striking out "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual,".

(b) Section 2 of such Act is amended by adding at the end thereof the following new subsection:

> "(14) The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.".

(c) The last sentence of section 8(d) of such Act is amended by striking out the words "the sixty-day" and inserting in lieu thereof "any notice" and by inserting before the words "shall lose" a comma and the following: "or who engages in any strike within the appropriate period specified in subsection (g) of this section,".

Appendix III

(d) (1) The last paragraph of section 8(d) of such Act is amended by adding at the end thereof the following new sentence: "Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

> "(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.
>
> "(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).
>
> "(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute."

(e) Section 8 of such Act is amended by adding at the end thereof the following new subsection:

> "(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following cer-

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tification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties."

SEC. 2. Title II of the Labor Management Relations Act, 1947, is amended by adding at the end thereof the following new section:

"CONCILIATION OF LABOR DISPUTES IN THE HEALTH CARE INDUSTRY

"SEC. 213. (a) If, in the opinion of the Director of the Federal Mediation and Conciliation Service a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 8(d) (which is required by clause (3) of such section 8(d)), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall

be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

"(b)(1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out its duties under this section.

"(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS-18 of the General Schedule under section 5332 of title 5, United States Code, including travel for each day they are engaged in the performance of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

"(c) After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

"(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section."

Appendix III

SEC. 3. The National Labor Relations Act is amended by adding immediately after section 18 thereof the following new section:

"INDIVIDUALS WITH RELIGIOUS CONVICTIONS

"SEC. 19. Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee."

SEC. 4. The amendments made by this Act shall become effective on the thirtieth day after its date of enactment.

Approved July 26, 1974.

2. National Labor Relations Act § 14; 29 U.S.C.

§ 164. Supervisors as union members; recognition by employers; declination of jurisdiction by Board over labor disputes; assertion of jurisdiction by State or Territorial agencies and courts.

Appendix III

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

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No. 77-872

In the Supreme Court of the United States

OCTOBER TERM, 1977

COMMITTEE OF LITERARY AND RESIDENTS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-872

COMMITTEE OF INTERNS AND RESIDENTS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-49a) is not yet officially reported. The opinion of the district court (Pet. App. 1a-32a) is reported at 426 F. Supp. 438.

JURISDICTION

The order of the court of appeals reversing the judgment of the district court was entered on September 21, 1977. The order of the court of appeals granting a permanent injunction was entered on November 1, 1977 (Pet. App. 50a-51a). The petition for certiorari was filed on December 13, 1977. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a state may afford collective bargaining rights to interns, residents, and clinical fellows at certain health care institutions after the National Labor Relations Board has determined that they are "primarily students" rather than "employees" and thus should not be afforded such rights under the National Labor Relations Act.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 73 Stat. 541, 88 Stat. 395, 29 U.S.C. (1970 ed. and Supp. V) 151 *et seq.*), are set forth at Pet. App. 52a–57a.

Other relevant provisions of the Act are:

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act

explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the correspond-

ing provision of this Act or has received a construction inconsistent therewith.

STATEMENT

In 1974, Congress amended[1] the National Labor Relations Act ("the Act") to extend the jurisdiction of the National Labor Relations Board to nonprofit hospitals and other health care institutions. Following the enactment of the amendments, a number of organizations, including petitioner herein, filed election petitions with the Board seeking to represent and bargain collectively for interns, residents, and clinical fellows ("housestaff officers") at certain nonprofit teaching hospitals. On March 23, 1976, the Board issued its lead decision on the question, *Cedars-Sinai Medical Center,* 223 NLRB 251, 253, in which it concluded that housestaff officers, although they "possess certain employee characteristics," are "primarily engaged in graduate educational training" and "their status is therefore that of students rather than of employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). Accordingly, the Board dismissed the petition.[2]

Petitioner then filed an election petition with the New York State Labor Relations Board

[1] Public Law 93–360, 93rd Cong., 2d Sess. (approved July 26, 1974), 88 Stat. 395.

[2] A number of other petitions were dismissed on the basis of *Cedars-Sinai.* See *St. Christopher's Hospital,* 223 NLRB 166; *University of Chicago Hospitals,* 223 NLRB 1032; *St. Clare's Hospital,* 223 NLRB 1002; *Buffalo General Hospital,* 224 NLRB 76; *Wayne State University,* 226 NLRB 1062. See also *St. Clare's Hospital & Health Center,* 229 NLRB No. 158 (decided May 26, 1977).

("NYSLRB"), the labor relations agency for the State of New York, seeking to represent and bargain collectively for housestaff officers at Misericordia Hospital Center. On July 14, 1976, the NYSLRB held that the hospital was subject to the jurisdiction of the NLRB, and that the NLRB's decision in *Cedars-Sinai* required dismissal of the petition. *Misericordia Hospital Medical Center,* 39 SLRB No. 32, decided July 14, 1976.

Petitioner then sued in state court to compel the NYSLRB to reinstate and process its petition. The state court ruled that the NYSLRB was free to take jurisdiction over housestaff officers. It read a more recent NLRB decision, *Kansas City General Hospital,* 225 NLRB 110, as expanding *Cedars-Sinai* and holding that states were not preempted from exercising jurisdiction over housestaff officers in nonprofit hospitals.[3]

Shortly thereafter, in response to the state court's decision, the Board, acting *sua sponte,* issued a revised decision in its *Kansas City* case, which had been relied on by the state court. In that revised decision (*Kansas City II*), the Board stated:

> Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in *Cedars-Sinai;* that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find Federal

[3] *Committee of Interns and Residents* v. *New York State Labor Relations Board,* 388 N.Y.S. 2d 509, 512 (Sup. Ct. N.Y. Co.).

preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, * * * left the question as to whether [housestaff officers] were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in *Cedars-Sinai,* by finding residents, interns, and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy.

Exercising the authority to protect its exclusive jurisdiction recognized in *National Labor Relations Board* v. *Nash-Finch Co.,* 404 U.S. 138, the Board then filed the instant suit in the District Court for the Southern District of New York. The Board sought an injunction barring petitioner from requesting the NYSLRB to assert jurisdiction over housestaff officers at health care institutions, and barring the NYSLRB from attempting to assert such jurisdiction.

The district court denied injunctive relief and granted petitioner's motion for summary judgment.[4]

[4] While the district court had the case under advisement, the state court reversed its earlier decision. *Committee of Interns and Residents* v. *New York State Labor Relations Board*, 391 N.Y.S. 2d 503 (Sup. Ct. N.Y. Co.).

The district court reasoned that, "[b]ecause of the NLRB's ruling that housestaff are not 'employees' under the NLRA, the labor relations of housestaff physicians are not subject to the provisions of the Act and are not within the jurisdiction of the Board" (Pet. App. 31a–32a).

The court of appeals reversed (Pet. App. 34a–49a). It held that the Board's conclusion that housestaff officers are not "employees" within the meaning of the Act was not a cession of jurisdiction over housestaff officers. Rather, the court of appeals stated, "the NLRB concluded [in its *Cedars-Sinai* and *Kansas City II* decisions] that, although it has jurisdiction, it would be contrary to national policy to extend collective bargaining rights to housestaff because they 'are primarily students' " (Pet. App. 40a). The court of appeals, finding the situation here analogous to that in *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767, concluded that a state may not assert jurisdiction over individuals who the Board has decided, as a matter of national labor policy, should not be accorded collective bargaining rights (Pet. App. 41a–44a). The court of appeals enjoined the NYSLRB from asserting jurisdiction over the labor relations of interns, residents, and clinical fellows, and enjoined petitioner from attempting to invoke such jurisdiction (Pet. App. 50a–51a).

ARGUMENT

The decision of the court of appeals is correct and in accord with established principles, and there is

no conflict of decisions. Review by this Court is unwarranted.

1. Both the court of appeals and the district court recognized, and petitioner does not dispute, that "the unequivocal intent of Congress" in enacting the 1974 amendments was to grant the Board exclusive jurisdiction over the labor relations of health care institutions (Pet. App. 44a–46a, 19a–20a). This jurisdiction includes the power to decide whether policies of the National Labor Relations Act would be effectuated by extending collective bargaining rights to individuals associated with such institutions, and, if so, to classify them as "employees" under the Act. The Board concluded that housestaff officers are primarily students, rather than "employees" within the meaning of the Act, and petitioner does not attack that conclusion here. In so concluding, the Board has not put these students "beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy." *Kansas City II, supra,* 225 NLRB at 109. As the court of appeals added, "the NLRB has not ceded jurisdiction over housestaff [to the states]. Rather, the NLRB concluded that, although it has jurisdiction, it would be contrary to national policy to extend collective bargaining rights to housestaff because they 'are primarily students'" (Pet. App. 40a).

The court of appeals therefore properly concluded that the situation here was analogous to that in *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra,* where the Board had refused to certify bargaining units of foremen. In *Bethlehem Steel,* the

Board never denied "its own jurisdiction over petitions because they were by foremen," but "made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes" (330 U.S. at 775). Similarly, here the Board never denied its jurisdiction over the housestaff petitions but refused to proceed to elections for them because of its determination that it would not effectuate national labor policy to extend collective bargaining rights to housestaff. Accordingly, here, no less than in *Bethlehem Steel:*

> The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control over their labor relations in general. It asserts, and rightfully so, * * * its power to decide whether [housestaff] may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted. [330 U.S. at 776.]

Here, as there, the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute" (330 U.S. at 774).[5]

---

[5] Petitioner contends (Pet. 27) that a "proper reading of *Bethlehem Steel* limits its preemptive effect to exclusions necessary and fundamental for the collective bargaining by those covered by the NLRA * * *." However, as shown *supra*, the rationale of that decision is not so limited.

Nor is petitioner aided by the fact that, because the Act excludes agricultural workers from the definition of "employee" in Section 2(3), the states may regulate the labor relations of such workers (see Pet. 26). As the court of appeals pointed out, "the underlying Congressional intent can lead to opposite results for

2. Petitioner argues (Pet. 23–24) that *Bethlehem Steel* does not apply here because the Board has created a "no-man's land" which, petitioner argues, can be created only by Congress. The short answer to petitioner is that the Board's decision does not create a "no-man's land." A "no-man's land" exists where "State authorities [are] without power to act in cases in which the Board [has], but [does] not exercise, jurisdiction under its established standards." 25th NLRB Annual Report 19 (1960), quoted at Pet. 31. Here the Board has exercised its jurisdiction by holding that housestaff officers are primarily students and that therefore it would be contrary to national labor policy to afford them collective bargaining rights.*

3. Petitioner's argument (Pet. 34–36) that the Board's action violates the Tenth Amendment and

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preemption purposes." The "exclusion of agricultural workers in § 2(3) * * * is the result of a Congressional decision not to exercise federal power over farm labor. * * * However, the exclusion of supervisors in the same Section is the result of a Congressional determination that national labor policy requires that supervisors not be guaranteed collective bargaining rights." (Pet. App. 44a n. 5.) As shown, the Board concluded that national labor policy requires a similar conclusion with respect to housestaff.

* Petitioner's fear that "house staff officers' labor relations and disputes, including strikes, [will] be left wholly unchecked and unregulated" (Pet. 20) as a result of the decision below is unfounded. Although the states may not act in contravention of national labor policy by treating housestaff as employees and granting them collective bargaining rights, this is not to say that the states would be powerless to regulate housestaff activities in a manner consistent with national policy. See *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Association, AFL–CIO*, 382 U.S. 181.

National League of Cities v. *Usery*, 426 U.S. 833, is baseless. *National League of Cities* addressed the problems raised "when Congress seeks to regulate directly the activities of States as public employers." 426 U.S. at 841. Nothing of the sort has happened here since the health care institutions involved are private employers. Congressional power to regulate labor-management relations is firmly established under the Commerce Clause, and inconsistent state efforts to regulate those relations must yield under the Supremacy Clause. *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra*, 330 U.S. at 773–774.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and

NEW YORK STATE LABOR RELATIONS BOARD,

Respondents.

REPLY OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Opinion Below

The opinion of the Court of Appeals for the Second Circuit is officially reported at 566 F.2d 810.

REASONS RELIED UPON

I.

***Bethlehem Steel* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947), does not sustain respondent's argument that the petition should be denied.**

The brief of the National Labor Relations Board ("NLRB") in opposition to the petition relies almost ex-

clusively upon the decision of this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767 (1947). That case is distinguishable for reasons we have already briefed. Petitioner's Brief ("Pet. Br.") 26-33.

The District Court also distinguished *Bethlehem Steel* on the grounds that at the time of *Bethlehem Steel* the NLRB concededly had jurisdiction over the supervisory employees there involved so that the NLRB possessed the necessary cognizance to declare a national labor policy as to such employees, and here the NLRB has presumed to declare a preemptive national labor policy as to house staff officers over whom the NLRB has no jurisdiction if, as the NLRB found, they are not employees for the purposes of the National Labor Relations Act ("NLRA"). Petitioner's Appendix ("Pet. App.") 22a-24a. This decisive distinction between *Bethlehem Steel* and this case is disputed by the NLRB, which claims that "here the Board never denied its jurisdiction over the housestaff petitions." NLRB Brief ("NLRB Br.") 9. The NLRB is plainly wrong in this respect. The petitions were dismissed because the NLRB found housestaff not to be employees and, therefore, the petitioning housestaff associations not to be labor organizations for purposes of the NLRA (Pet. App. 3a-5a, 20a-22a, 23a-24a), and it is precisely employee and labor organization status which is the NLRA statutory predicate for NLRB jurisdiction (Pet. App. 21a-22a).

The implications sought here to be drawn by the NLRB from *Bethlehem Steel* are so vast as to warrant this Court's review and clarification of *Bethlehem Steel.* We read *Bethlehem Steel* to deal with the preemption of state coverage of supervisory employees where the NLRB and this Court perceived such coverage to interfere with the integrity of the bargaining process of NLRA-covered rank-and-

file employees. The NLRB expressly rejects such a construction (NLRB Br. 9 n.5), and reads *Bethlehem Steel* much more broadly to authorize the NLRB to deny collective bargaining rights,—state or national,—to any group of putative employees wherever the NLRB has made the "determination that it would not effectuate national labor policy to extend collective bargaining rights" (*id.* at 9), without any showing that state coverage of such putative employees involves any NLRA-protected or NLRA-phohibited activities of those or any other employees (see Pet. App. at 21a-22a). We believe it an unprecedented assertion of administrative power over our system of federalism to contend, as does the NLRB here, that wherever that agency determines that collective bargaining is not an appropriate modality for the participants in any activity with an employment component, the NLRB can, without any further legislative authorization or instruction, proscribe not only NLRA-coverage but any state or local labor relations coverage.

Moreover, serious impairment of NLRA § 14(c) (29 U.S.C. 164(c)) (Pet. App. 57a) is necessarily implicated by the NLRB's application of *Bethlehem Steel.* If the NLRB is correct, exclusion of groups from coverage by the NLRB need not be premised upon an express NLRA § 14(c)(1) declination of jurisdiction,—a "determination that it would not effectuate national labor policy to extend collective bargaining rights" would suffice to exclude coverage. By this process, the NLRA § 14(c)(2) consequence of state jurisdiction, where NLRB jurisdiction is declined pursuant to NLRA § 14(c)(1), could be readily averted by the NLRB.

Bethlehem Steel, which was superseded by NLRA § 14 (a) within the year it was decided (see Pet. Br. at 28) and hardly referenced thereafter (*id.* at 31-32 n. 20), plainly cannot sustain the weight with which it is freighted by the

NLRB. The powers claimed under *Bethlehem Steel* by the NLRB were nowhere perceived or articulated by the Court in *Bethlehem Steel* or elsewhere. And if *Bethlehem Steel* can be fairly construed to support its reading by the NLRB, then it is timely for this Court to review *Bethlehem Steel* in the light of the supervening and material language and history of NLRA §§ 14(a) and 14(c). See Pet. Br. at 28-31.

II.

The limited scope of judicial review which would result from the position asserted by the NLRB here is an additional reason for allowing the petition.

After the petition was filed here, the United States District Court for the District of Columbia, by decision dated January 17, 1978, granted the motion of the NLRB for summary judgment and dismissed the complaint of the petitioner here and other housestaff associations seeking to review and reverse the NLRB determinations that housestaff are not employees within the meaning of the NLRA. *Physicians National House Staff Association, et al.* v. *Murphy, et al.* (Civ. No. 77-0358), 97 L.R.R.M. 2444. That decision did not deal with the merits in depth because it deemed the scope of review extremely limited, in the manner prescribed by *Leedom* v. *Kyne*, 358 U.S. 184 (1958), since review was sought of an NLRB determination in a representation proceeding.[1]

The NLRB invocation of the review strictures of *Leedom* v. *Kyne* is another basis for the allowance of the writ sought here. The extraordinary preemptive power claimed by the NLRB is predicated by the NLRB upon an under-

[1] NLRA § 10(f) judicial review was, of course, unavailable since no unfair labor practice proceeding was possible once the housestaff petitions were dismissed.

lying NLRB determination of housestaff exclusion and NLRB declaration of national labor policy which are, according to the NLRB, virtually subject to no judicial accountability.[2] Moreover, not only is the underlying determination thus largely immunized from judicial review if the NLRB prevails, but absent the granting of the writ here, subsequent NLRB determinations of preemption would be of doubtful reviewability.

In this litigation judicial review was at the instance of the NLRB because a state court had found state jurisdiction. See Pet. Br. at 6-10. But if the court below is sustained, the next occasion of NLRB preemptive exclusion of state and national coverage will likely not require the NLRB to initiate litigation on the issue of its powers to preempt. In such circumstances it is not clear whether the NLRB's position would allow any review of the exercise of the NLRB's newly asserted powers of preemption.

Similar considerations were influential on the issue of preemption in *Vaca* v. *Sipes*, 386 U.S. 171, 181-83 (1967). There the exercise of the NLRB General Counsel's "unreviewable discretion to refuse to institute an unfair labor practice complaint" (*id.* at 182) was held not to have a preemptive effect because to accord it such effect would mean that "the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint" (*ibid*).

[2] The court below assumed that the "wisdom" of the NLRB housestaff decisions and the issue of whether "the NLRB abused its discretion" in those decisions, would be reviewed in the District of Columbia action. 566 F.2d at 816-17.

CONCLUSION

The petition for writ of certiorari should be granted.

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